91-1322

No. ____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1991

RICHARD J. BRIGNOLI
Petitioner,

v.

BATTLE FOWLER, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates, et. al.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Second Circuit correctly hold that in representative suits by limited partners alleging only derivative claims against the general partner, where the limited partnership is a necessary party under state law, district courts in the absence of diversity of citizenship may decide the case without jurisdiction and, thereafter, have their jurisdiction restored retroactively by the Court of Appeals, by simply renaming the action a class action, and dismissing the partnership, while allowing a Court appointed Receiver, lacking capacity and standing, to represent the partnership?

2. Did the Second Circuit correctly hold that district court violations of the Seventh Amendment are unreviewable by the appellate courts if the trial judge, after violating the Amendment by refusing to empanel a jury, compounds that constitutional infraction by deciding himself the very factual issue which should have been presented to and decided by a jury?

LIST OF PARTIES

The caption to this Petition lists all the parties to this Petition. In the proceeding before the United States Court of Appeals for the Second Circuit, Arie E. David and Brignoli Models, Inc. were shown as defendants but not appellants. The action filed in the District Court names Richard J. Brignoli, Arie E. David and Brignoli Models, Inc. as defendants, but summary judgment, which is the subject of this Petition, was entered by the District Court only against Petitioner. For the above reasons, Arie E. David and Brignoli Models, Inc. are not petitioners in this Petition.

RULE 29.1 LISTING

Petitioner is an individual. While not parties to this Petition, Arie E. David is an individual, and Brignoli Models, Inc. does not have any parents or subsidiaries.

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II.

CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER, UNDER *Ross v. Bernhard*, 396 U.S. 531 (1970), A RIGHT TO TRIAL BY JURY EXISTS WHERE PARTNERSHIP DERIVATIVE CLAIMS FOR MONEY DAMAGES ARE ASSERTED AGAINST THE GENERAL PARTNER, OR AN OFFICER THEREOF, WHERE A COURT HAS RULED THAT FEDERAL JURISDICTION EXISTS, SINCE A CIRCUIT COURT HAS AFFIRMED A LOWER COURT'S DENIAL OF A JURY TRIAL WHICH IS IN CONFLICT WITH AN UNBROKEN LINE OF DECISIONS OF THIS COURT THAT GRANT SUCH A RIGHT.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

Petitioner Richard J. Brignoli respectfully requests that writ of certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), entered on November 15, 1991, which affirmed the Opinion and Decision of the United States District Court for the Southern District of New York granting summary judgment in favor of respondent's breach of fiduciary duty claims against petitioner.

OPINIONS BELOW

The Order without opinion of the Court of Appeals dated November 15, 1991 is unreported and appears at 1A-2A under the caption *Battle Fowler, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates v. Richard J. Brignoli, Arie E. David and Brignoli Models, Inc.* The Opinion and Decision of the United States District Court for the Southern District of New York dated June 18, 1991 is reported as *Battle Fowler, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates v. Richard J. Brignoli, Arie E. David and Brignoli Models, Inc.*, 765 F. Supp. 1202 (S.D.N.Y. 1991) and appears at 2A-9A.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1991. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

A. Amendment 7, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

B. Statutes:

28 U.S.C. Sec. 1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different states;

(2) citizens of a state and citizens or subjects of a foreign state;

(3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 U.S.C. §1603(a)], as plaintiff and citizens of a state or of different states.

28 U.S.C. Sec. 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

N.Y.Civ.Prac.L. 1025 (McKinney's 1976)

Two or more persons conducting a business as a partnership may sue or be sued in the partnership name . . . .

N.Y. Partnership Law Sec. 115-a.1. (McKinney's 1988)

An action may be brought in the right of a limited partnership to procure a judgment in its favor, by a limited partner, additional limited partner, or substituted limited partner.

N.Y. Partnership Law Sec. 115 (McKinney's 1988)

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership, and except in cases provided for in section one hundred fifteen-a of this article.

C. Rule Provisions

Fed. R. Civ. P. 17 – Reproduced at 99A
Fed. R. Civ. P. 19 – Reproduced at 101A
Fed. R. Civ. P. 21 – Reproduced at 103A
Fed. R. Civ. P. 23.2 – Reproduced at 104A

STATEMENT OF THE CASE

At the core of this case is a dispute between three limited partners of a limited partnership and the general partner of the partnership and its chief executive officer, the petitioner. These three limited partners held, collectively, a thirty-six percent interest in the partnership. The limited partnership was engaged in managing equity portfolios of corporate, union and public pension funds using investment techniques developed by the petitioner, and was a registered investment advisor under the Investment Advisors Act of 1940.[1]

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[1] The partnership, Brignoli Curley & Roberts Associates ("BCR") was a Delaware limited partnership with its principal office in New York. The sole general partner was Brignoli & Curley, Inc. ("BCI"), a Delaware corporation. Petitioner, Richard J. Brignoli, a Connecticut resident, was until August 10, 1989, the chief executive officer of BCI. BCR ceased operations as of September 30, 1989 pursuant to an order of the District Court in this action. *See* 75A-78A. The largest limited partner of BCR was Brignoli Models, Inc. ("BMI"), a Delaware corporation, which develops securities trading models which it licensed to BCR and other firms. BMI is owned by 13 individuals, including petitioner who is its largest owner. Plaintiffs John J. Curley and James Karanfilian, citizens of New Jersey, and Duane Roberts, a Connecticut resident, were each limited partners in BCR.

This case was brought by the three limited partners as a derivative action on behalf of the partnership and on behalf of themselves against the general partner and the petitioner, claiming breaches of fiduciary duties to the partnership as set forth in the partnership agreement, and that through such breaches and acts of negligence, the partnership was injured. They sought, *solely on behalf of the partnership,* money damages, removal of the general partner or dissolution of the partnership, and a partnership accounting. Federal jurisdiction was based on diversity of citizenship. 28 U.S.C. §1332(a).

The partnership, its general partner, and the largest limited partner, which held a fifty-four percent interest in the partnership, filed counterclaims against the three plaintiffs, who in addition to their equity interests in the partnership, also were employed by it or the general partner to manage its day-to-day business. It was claimed that they, individually and in combination with an outside brokerage firm, combined to breach their agreements with, and duty to, the partnership by failing to oversee the execution of securities trades and that, as a result, the partnership's clients were harmed and that the partnership suffered damage to its reputation. Money damages were demanded. After the dispute erupted, plaintiffs discontinued their management activities on the partnership's behalf.

1. *The District Court Proceedings.* Plaintiffs filed this action in the Federal District Court for the Southern District of New York on July 29, 1988. At all times the action has been before District Court Senior Judge Milton Pollack. Federal jurisdiction was based on diversity of citizenship. The question of diversity of citizenship was addressed by the District Court, which dismissed plaintiff Roberts since he shared common residency with petitioner. The Court held that the citizenship of a partnership was determined by the citizenship of its general partner, an argument this Court specifically rejected in *Carden v. Arkoma Associates,* 494 U.S. 185 (1990); and that diversity of citizenship existed between the remaining two plaintiff limited partners and the partnership at the time when the Complaint was filed. Plaintiffs demanded both money damages and equi-

table relief. Defendants demanded a trial by jury. The partnership, BCR, and the general partner, BCI, along with third party plaintiff, BMI (BMI was not sued by plaintiffs) filed counterclaims against plaintiffs and claims against third party defendants who performed brokerage services for BCR.

On May 26, 1989 the District Court issued an Order listing the order of trial. *See* 87A-88A The crossclaims against third party defendants were to be tried first by a jury trial. The plaintiffs' claims were to be tried next in a non-jury trial to determine, according to the District Court, the partnership's entitlement to the requested equitable relief. Trial of plaintiffs' demand for money damages was postponed. *In this manner, the District Court bifurcated the trial of defendants' legal liability and legal remedies resulting from such liability, depriving petitioner of a jury trial on the issue of liability as he had demanded.*

The jury trial against third party defendants resulted in a verdict for such defendants. The partnership appealed the verdict to the Court of Appeals after its entry by the District Court. While the appeal was pending, the District Court conducted a bench trial of defendants' liability to the partnership for alleged breaches of fiduciary duty. On August 4, 1989 the District Court issued its decision finding the general partner and petitioner liable. *See* 37A-74A. The Court ordered removal of the general partner, and instructed the limited partners to vote whether to replace the general partner or dissolve the partnership. The Court enjoined the largest limited partner, BMI, from voting even though BMI was not a defendant. Curley v. Brignoli Curley Roberts Associates, 746 F. Supp. 1208, 1222 (S.D.N.Y. 1989). *See* 72A-73A.

On August 28, 1989, following a purported vote of the limited partners, the District Court ordered dissolution and appointed the law firm of Battle Fowler as Receiver for the partnership. The Order instructed the Receiver, among other things, to report to the Court on which claims for money damages against the partners should be pursued. The Receiver recommended that the partnership's appeal of the jury verdict against

the cross-defendants be withdrawn, and that the partnership's claims against the plaintiff limited partners be dropped, and that only the plaintiffs' demand for money damages against petitioner be pursued. The Receiver also recommended that new claims be filed against BMI and Arie E. David, a former legal counsel to the partnership. The District Court approved. *See* 80A-81A. The Receiver's action is described below.

2. *The Court of Appeals Proceedings.* While defendants' appeal of the District Court's bench trial decision was pending before the Court of Appeals, this Court decided in *Carden* that the citizenship of a limited partnership for purposes of federal diversity jurisdiction must be determined on the basis of the citizenship of all its partners, both general and limited. This decision rejected the rule of diversity jurisdiction which the District Court relied upon for jurisdiction in the present case. The defendants brought the *Carden* decision to the Court of Appeals' attention and demanded that the Court order dismissal of the action for lack of federal jurisdiction.

The Court of Appeals denied defendants' demand to dismiss. While acknowledging that under this Court's controlling precedent laid out by Justice Scalia in *Carden,* the case must be dismissed, the panel created a new legal standard for federal diversity jurisdiction in the Second Circuit under which a partnership derivative action can be perpetuated by dismissing the partnership, renaming the action a class action, and appointing plaintiff limited partners as class representatives, even though under New York state partnership law the partnership is an indispensible party to the action, and even where, as here, there exists a conflict among the class of limited partners. In this way the Court of Appeals, on the heels of *Carden,* was able to disregard that decision and restore the District Court's jurisdiction. *Curley v. Brignoli, Curley & Roberts Associates,* 915 F.2d 81 (2d Cir. 1990). *See* 11A-36A.

3. *The First Petition for Writ of Certiorari.* The partnership and petitioner filed a petition for writ of certiorari with this

Court following the Court of Appeals decision, without knowledge of a more recent decision by the Eighth Circuit which is in sharp conflict with the Second Circuit's decision below as to the proper interpretation of the Court's decisions in *Carden* and in *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826 (1989). *See Buckley v. Control Data Corporation,* 923 F.2d 96 (8th Cir. 1991). Justice White would have issued the writ, but the Court denied it. *Brignoli & Curley, Inc. v. John J. Curley,* 111 S.Ct. 1430, 113 L.Ed.2d 484 (April 1, 1991). *See* 10A. Petitioner respectfully submits that in view of the *Buckley* decision, which the Court had not previously considered, and the subsequent decisions below, this matter is ripe for review now, as hereinafter discussed below.

4. *The Second District Court Proceedings.* Following remand to the District Court, the District Court did not discharge the Receiver even though the Receiver lacked standing in the partnership's absence. *See* 82A-83A. The Receiver filed a motion for summary judgment on behalf of the partnership on its money damage claims against petitioner, relying on the doctrine of collateral estoppel using the District Court's findings against petitioner in the previous bench trial. The District Court granted the motion, and entered a final judgment against petitioner in the total amount of $845,355.83. While at this stage the action under the Court of Appeals order was technically a class action on behalf of the minority limited partners, the District Court disregarded the fact that a *Court appointed Receiver for a limited partnership has no authority to assert claims which belong to limited partners as individuals. Glusband v. Fittin Cunningham Lauzon, Inc.,* 582 F. Supp. 145, 149 (S.D.N.Y. 1984). Further, the District Court's order empowering the Receiver at all times has been confined to prosecuting derivative claims belonging to the partnership. *See* 75A-78A.

5. *The Second Court of Appeals Proceedings.* Petitioner appealed the District Court's summary judgment to the Court of Appeals. Petitioner asked the Court to reconsider its earlier decision based not only on the unauthorized action of the Receiver in prosecuting partnership claims in violation of the Court's

order of remand, but also because petitioner had been improperly denied a trial by jury under the controlling precedent of this Court's decision in *Ross v. Bernhard,* 396 U.S. 531 (1970). In that case, Justice White writing for the Court reversed the Second Circuit which had denied a jury trial in a stockholders' derivative action. The Court of Appeals affirmed without opinion in an unreported order, entered on November 15, 1991. *See* 1A-2A.

REASONS FOR GRANTING THE WRIT

The clear-cut legal issues presented by this precedent-setting decision are precisely the type of controlling issues that warrant review by this Court.

In particular, the decision below warrants review because (i) it signals a significant retreat from this Court's policy recently announced in *Carden* that further expansions of federal diversity jurisdiction are to be left to Congress, (ii) it threatens to bring into the federal courts an entire class of limited partnership litigation that under *Carden* would be tried in state courts, and (iii) it is in sharp conflict with decisions of all other Circuit Courts which have decided the same issues.

In addition, the Court of Appeals has failed to give effect to controlling New York state law which requires that the partnership must be a party to all actions in which claims of the partnership are decided. Further, the Court of Appeals has condoned the questionable practice of a Court appointed Receiver for the partnership prosecuting claims on behalf of individual limited partners in the partnership's absence.

Finally, the Court of Appeals decision has the effect of denying petitioner his right to a trial by jury of claims based on theories of breach of contract and negligence, thereby signaling a retreat from the standard established by this Court in *Ross v. Bernhard* on the important question of the right to trial by jury guaranteed by the Seventh Amendment.

Petitioner respectfully submits that the questions presented involve serious issues of law which the Court of Appeals refused to treat properly because the case had already been decided on the merits by the District Court. We believe that questions of federal jurisdiction, respect for state law and the important right to a trial by jury cannot be decided on that basis. Indeed, this Court reversed a District Court decision on the merits in *Carden*. As Justice Marshall stated in a jury trial case that arrived at the Court following a full trial below, "In all these circumstances, relitigation is the only mechanism that can completely correct the error of the court below."

Lytle v. Household Manufacturing, 494 U.S. 545, 110 S.Ct. 1331, 1337 (1990).

Further, if the Court determines that federal jurisdiction is lacking, and that petitioner's liability should have been decided by a state court, the District Court's opinion on the merits becomes irrelevant. Since jurisdiction must be decided at any stage of a proceeding, some decisions will occur before a decision on the merits and others thereafter. Petitioner respectfully submits that federal jurisdiction should not turn on the stage of a case when the issue first presents itself, especially where, as here, the controlling standard was not announced by the Court until after the bench trial on liability. In addition, the question of petitioner's right to a trial by jury did not fully present itself until after this Court's denial of petitioner's first petition for writ of certiorari, when the District Court entered its summary judgment for money damages against petitioner.

I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER, UNDER *CARDEN V. ARKOMA ASSOCIATES,* 494 U.S. 185 (1990), DISTRICT COURTS MUST DISMISS LIMITED PARTNERSHIP SUITS, INVOLVING CLAIMS AGAINST PARTNERS, FOR LACK OF FEDERAL DIVERSITY JURISDICTION, SINCE THERE EXISTS A CONFLICT BETWEEN THE CIRCUITS OVER WHETHER JURISDICTION EXISTS, THE NUMBER OF CASES AFFECTED BY THE DECISION BELOW IS POTENTIALLY LARGE, AND THAT DECISION IS INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS AND WITH APPLICABLE STATE LAW.

The Second Circuit has created an elastic exception to this Court's standard for determining federal diversity jurisdiction. This exception poses a serious threat that in the future parties will use the federal courts, rather than state courts, to resolve disputes that frequently arise in limited partnership situations, thereby circumventing this Court's clear rule in *Carden* on the need for diversity of citizenship. Moreover, the decision cannot be reconciled with the decisions of other circuits on the same issues.

To avoid the risk of impermissible speculation, this Court decided in *Carden* that a partnership, being an unincorporated entity, always shares the citizenship of all its members, both general and limited partners.

Justice Scalia, writing on behalf of the Court in *Carden,* set the Court's policy priorities regarding the important issue of diversity jurisdiction, stating:

> "Thus, the course we take today does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives." 494 U.S., at 197.

The Court of Appeals, conversely, announced a new rule of diversity jurisdiction based on its view, not shared with other circuits, that each complaint must be *liberally construed* "to determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded". 915 F.2d, at 84. *See* 19A. The Second Circuit's unprecedented exception unravels in one stroke what this Court so recently accomplished. The new standard of diversity jurisdiction created by the Court of Appeals is confusing and illogical, and cannot be reconciled with long established principles of state partnership law.

1. *The Class Action is Only a Fiction.* In the present case, the reclassification of the action from a derivative action to a class action was in name only. The two plaintiff "class representatives" never assumed responsibility for the prosecution of the case following their appointment by the Court of Appeals. Instead, they and their counsel immediately disappeared from the case. Upon remand to the District Court, a Court appointed Receiver who represented the partnership, and not the members of the class, as individuals, continued to prosecute the derivative claims against petitioner. The District Court conducted no hearing and rendered no decision on which claims were properly those of the class members, and which belonged to the partnership. Nor did the District Court question the standing and capacity of the Receiver to prosecute the class action in the absence of the partnership. *See Glusband v. Fittin Cunningham Lauzon, Inc., supra.*[2] The Court did not change its original order empowering the Receiver to prosecute only claims owned by the partnership.

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[2] Other District Court judges in New York are troubled by the Court of Appeals decision, one referring to it as "major surgery", *Shlomchik v. Richmond 103 Equities Co.*, 763 F. Supp. 732, 740 (S.D.N.Y. 1991); and another suggesting that it is nothing more than a license "to subvert the Supreme Court's holding in *Carden* by straining to locate a diverse general or limited partner and then appointing that partner as a class representative", *900 3RD Ave. Associates v. Finkielstain*, 758 F. Supp. 928, 931 (S.D.N.Y. 1991).

Indeed, the caption of the District Court's decision awarding damages against petitioner makes clear that those claims are derivative claims belonging to the partnership and that the class action was only a fiction invented by the Court of Appeals as an expedient to avoid dismissing the case under this Court's bright line standard in *Carden: Battle Fowler, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates v. Richard J. Brignoli, et. al.*, 765 F. Supp. 1202 (S.D.N.Y. 1991). *See* 2A. The District Court also held that the distinction between BCI, the corporate general partner, and petitioner, its CEO, was artificial and that no apportionment between the two would be allowed. 765 F. Supp, at 1206. *See* 8A.

2. *The Court of Appeals' Failure To Apply New York Limited Partnership Act.* In this case the Second Circuit failed to follow New York law on the definition of a partnership derivative claim and the jurisdictional requirements laid down for such claims. The Second Circuit decided wrongly that under New York law, the question whether a suit should be brought as a class action or derivatively turns on the relief sought, rather than on the nature of the claims. 915 F.2d, at 88. *See* 27A. For this proposition, the Second Circuit relied on a decision of the New York Court of Appeals in *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 223 N.E.2d 869 (1966). That decision, however, does not support the Court's reasoning.[3] More important, partially in response to the *Lichtyger* decision and the perceived confusion it created, the New York legislature amended the New York Partnership Act in 1968 to provide specifically for derivative actions by limited partners. N.Y. Partnership Law Sec. 115-a (McKinney's 1988). Following this amendment, limited partners with derivative claims against the general partners for breaches of

[3] The issue of federal diversity jurisdiction obviously was not before the New York Court of Appeals in *Lichtyger*. Further, Judge Fuld pointed out that the limited partners' claims for money damages in that case were individual claims as the money was owed to them directly by the partnership. 223 N.E.2d, at 872. Their claims were analogous to the right of limited partners to receive scheduled distributions of profits, which under the present New York Partnership Law may be brought as a class action. *Albert v. Haimes*, 315 N.Y.S.2d, at 335.

fiduciary duty have been required to bring their action on behalf of the partnership, and not as individuals in a class action. N.Y. Partnership Law Sec. 115 (McKinney's 1988). This legislative history is detailed in *Alpert v. Haimes,* 64 Misc.2d 608, 315 N.Y.S.2d 332 (Sup. Ct. 1st Dpt. 1970).

3. *Limitations of Federal Class Action Rule 23.2.* The Second Circuit construed Rule 23.2, Fed.R.Civ.P. to authorize reclassification of a partnership in a derivative action to a *dispensible* party, even though under New York law, the partnership would be a necessary party in a state court action. In carving out this exception to *Carden* the Second Circuit rejected the Advisory Committee's comment to Rule 23.2 which states that

> "Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b)."

The Second Circuit acknowledged that under the New York Partnership Law a partnership has the capacity to sue or be sued. 915 F.2d, at 87. *See* N.Y. Civ. L. 1025 (McKinney's 1976). Since this case could have been brought in the New York state courts, there was no necessity in this case to create an exception to the rule laid down in *Carden.* The Court of Appeals' decision undoubtedly will cause many other partnership derivative actions to flow through the New York Federal Courts rather than state courts.

The Second Circuit acknowledged that its interpretation of Rule 23.2 is in direct conflict with the First Circuit's decision in *Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Assn. of Mass.,* 900 F.2d 476 (1st Cir. 1990). *Northbrook,* like the instant case, involved a situation where the District Court had already rendered a decision on the merits for the plaintiff. The question of diversity jurisdiction arose for the first time on appeal. An Illinois excess insurer had brought

suit against an unincorporated association whose members included at least one Illinois citizen. The First Circuit remanded the case to the District Court to consider the question raised under Rule 23.2. Upon remand, the suit was dismissed on the grounds that under Massachusetts law the association could be sued in state Court. The First Circuit affirmed the dismissal. The Eighth Circuit reached the same conclusion in the *Buckley* decision. 923 F.2d, at 98.[4]

4. *The Court of Appeals Improperly Applied 28 U.S.C. Sec. 1653.* The Second Circuit held that 28 U.S.C. Sec. 1653 gave it authority to reclassify a derivative action as a class action in order to restore federal diversity jurisdiction. It relied on *International Bhd. of Boilermakers v. Local Lodge D354,* 897 F.2d 1400 (7th Cir. 1990). But that case did not involve the citizenship of a partnership decided in *Carden.* The Second Circuit acknowledged that Section 1653 deals solely with correcting defective *allegations* of jurisdiction. 915 F.2d, at 89. *See* 27A. The Court found no defect in plaintiffs' original characterization of this action as derivative.

5. *The Court of Appeals Improperly Dismissed an Indispensible Party under Rules 19(b) and 21.* While the Second Circuit dismissed BCR, the partnership in this action, as a party, 915 F.2d, at 92 (36A), the District Court has failed to act on this dismissal. If it had done so, the Receiver for the partnership should have been terminated. Yet, as the caption of the judgment below proves, the Receiver continued to represent the partnership after dismissal of BCR as a party.

In the *Buckley* case, the Eighth Circuit held that an indispensible party cannot be dismissed "for the sole purpose of curing

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[4] The Second Circuit's failure to remand the question of jurisdiction to the District Court to enable the parties to comment seems unfair. The Second Circuit acknowledged that its interpretation of Rule 23.2 was influenced by the District Court's decision on the merits which, as noted previously, also seems an improper basis for determining federal diversity jurisdiction. 915 F.2d, at 85. *See* 21A-22A.

a jurisdictional defect." 923 F.2d, at 98. That is precisely what the Second Circuit did in the present case.[5]

The Second Circuit relied on this Court's holding in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968) for the proposition that even an indispensible party could be dismissed from an action under Rule 19(b), Fed.R.Civ.P., in order to cure a jurisdiction problem. That case, however, did not involve the standing of the *plaintiffs* to bring or maintain the case. If the Second Circuit's threshold decision appointing class representatives is wrong, *Provident Tradesmens Bank* is not relevant. Once again, the Second Circuit's interpretation of Rule 19(b) was influenced by the District Court's decision on the merits. 915 F.2d, at 91. *See* 33A-34A.

The Second Circuit also is in conflict with the Eighth Circuit on the interpretation of this Court's decision in *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826 (1989). The Second Circuit viewed the decision as giving circuit courts unlimited authority under Rule 21, Fed.R.Civ.P., to characterize a party as dispensible. The Eighth Circuit, in *Buckley,* held that *Newman-Green* is irrelevant unless the circuit court has decided the threshold question whether the candidate for dismissal is, in fact, dispensible. *The Second Circuit failed to make this essential determination.*

Conversely, the Eighth Circuit, in a fact situation virtually identical to the present case, took that step, and determined that the partnership was indispensible. Accordingly, the Eighth Circuit dismissed the Complaint. 923 F.2d, at 97-98.

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[5] Retention of jurisdiction without the partnership where, as here, a conflict within the class of limited partners exists, could be prejudicial to the unrepresented limited partners. In the present case, for example, the Receiver withdrew claims against the class representatives previously filed by the partnership, even though BMI, the largest limited partner and not represented by the class representatives (82A), would benefit indirectly from any monetary damages recovered by the partnership from such individuals. *See* Judge Broderick's opinion in *Camden Securities Company v. Lupowitz,* 500 F.Supp. 653, 655 (E.D. Pa. 1980). *See also, Denkmann Associates v. Int'l. Paper Co.* 132 F.R.D. 168, 178 (M.D. La. 1990); *Lichtyger,* 223 N.E.2d, at 874.

II. CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER, UNDER *Ross v. Bernhard*, 396 U.S. 531 (1970), A RIGHT TO TRIAL BY JURY EXISTS WHERE PARTNERSHIP DERIVATIVE CLAIMS FOR MONEY DAMAGES ARE ASSERTED AGAINST THE GENERAL PARTNER, OR AN OFFICER THEREOF, WHERE A COURT HAS RULED THAT FEDERAL JURISDICTION EXISTS, SINCE A CIRCUIT COURT HAS AFFIRMED A LOWER COURT'S DENIAL OF A JURY TRIAL WHICH IS IN CONFLICT WITH AN UNBROKEN LINE OF DECISIONS OF THIS COURT THAT GRANT SUCH A RIGHT.

Since the Second Circuit determined that federal diversity jurisdiction exists in this action, petitioner respectfully submits that he is entitled under the Seventh Amendment to a trial by jury of the legal claims against him in this action, under this Court's decision in *Ross v. Bernhard*, 396 U.S. 531 (1970), and other Seventh Amendment decisions of the Court. Since the Court of Appeals' decision denies petitioner that important constitutional right, the judgment against him should be dismissed for that reason.

Justice White, writing for the Court in *Ross v. Bernhard*, stated the rule that the Seventh Amendment guarantees the right to a jury trial in stockholders' derivative actions against directors of a corporation. There is no basis for distinguishing the fiduciary relationship of corporate director and shareholder from that of general partner and limited partner. *Lichtyger v. Franchard Corporation* 18 N.Y.2d 528, 223 N.E.2d 873 (1966).

Justice White, in reversing the Second Circuit in *Ross v. Bernhard*, held that the right to a jury trial in derivative actions attaches to those allegations involving issues of breach of contract and negligence, and where money damages are demanded. Petitioner fits squarely within this category.

If the decision of the Second Circuit in the present case is allowed to stand, *Ross v. Bernhard* no longer will afford Seventh Amendment protection to the parties within the Second Circuit in any derivative action, whether corporate or partnership, where legal and equitable claims are mixed.

In this case the District Court denied petitioner a jury trial through *bifurcating the issues of legal liability and legal remedies.* The District Court conducted a bench trial on the issue of liability, which it held to be common to both legal and equitable relief requested by plaintiffs. After the Court of Appeals ordered dismissal of the partnership to restore jurisdiction, a Court appointed Receiver for the partnership obtained a summary judgment from the District Court for money damages against the petitioner without a jury trial, using the doctrine of collateral estoppel to incorporate the findings on liability from the bench trial. The damages consisted of the repayment of all salary earned by petitioner during 1988-1989 which the partnership had paid him, and payment of legal fees incurred by the partnership in defending plaintiffs' derivative action.[6]

Plaintiffs' claims tried at the bench trial were basically the same as those in *Ross v. Bernhard.* In the original Complaint filed by the limited partners, which was tried at the bench trial, there were general allegations of breach of fiduciary duty, which at trial were determined to arise out of breach of contract and negligence.

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[6] In dealing with the troublesome jury issue, Judge Pollack in his summary judgment opinion characterized the Receiver's action as one of *forfeiture,* implying that such an action would be in equity, not law:

> "Forfeiture is the ultimate relief sought in this action. The Receiver cited this Court's findings concerning the level and extent of misconduct and breach of fiduciary duty. These issues were actually litigated and decided at the Bench Trial." *Battle Fowler v. Brignoli,* 765 F.Supp. 1202, 1204 (S.D.N.Y. 1991). *See* 5A.

Even if the District Court is right about forfeiture, a position we reject, petitioner nevertheless was entitled to a jury trial of the issue of legal liability decided in the bench trial. *Tull v. United States,* 481 U.S. 412 (1987).

In his Answer to the Complaint, petitioner demanded a jury trial. Before the bench trial petitioner's counsel submitted a letter to the Court in which he laid out in detail petitioner's right to a jury trial of the legal claims of the limited partners, citing this Court's decisions in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), *Dairy Queen, Inc. v. Wood.* 369 U.S. 469 (1962), and *Ross v. Bernhard. See* 89A-98A.

In its Order of May 26, 1989 addressing the order of trial, the District Court ignored petitioner's jury demand, and ordered a bench trial to determine Petitioner's liability to the partnership for all purposes. *See* 87A-88A. In setting the order of trial, the District Court failed to distinguish between legal and equity claims. This Court determined in *Beacon Theatres* that where legal and equitable causes are joined in the same action, the legal claims must be tried first to a jury. Justice White noted in *Ross v. Bernhard* that "legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit". 396 U.S., at 538.

In the bench trial opinion, the District Court stated that "This phase of the litigation between the parties seeks the equitable intervention of this Court in a partnership dispute." 746 F.Supp., at 1210. *See* 37A. At the conclusion of the bench trial, the Court ordered the dissolution of the partnership, and appointed a Receiver with instructions, among other things, to make an accounting and to determine which outstanding claims for money damages against any partner should be continued. *See* 75A-78A.

In its Report to the Court, dated October 31, 1989, the Receiver recommended that claims for money damages against petitioner be pursued, arising out of findings in the bench trial of breaches of fiduciary duty. With the Court's approval (80A-81A), the Receiver filed a Complaint with the Court, seeking on behalf of the partnership solely money damages. In his Answer, petitioner demanded a trial of all issues by a jury. Thereafter, the Receiver filed a motion for summary judgment under the doctrine of collateral estoppel, relying on the Court's

findings in the bench trial. The District Court granted the motion, assessing damages against petitioner in the total amount of $845,355.83, including interest. 765 F. Supp., at 1206. *See* 9A.

Petitioner appealed this judgment to the Second Circuit, which affirmed the judgment without opinion in an unpublished order. *See* 1A-2A. Petitioner argued by brief and oral argument that the judgment violated the Seventh Amendment because petitioner had been denied a jury trial of both liability and damages of claims based entirely on breach of contract and negligence.

There is no doubt that the summary judgment determined petitioner's legal liability under common law theories of breach of contract and negligence. In its Complaint seeking money damages, the Receiver acknowledged that in the bench trial the Court found that petitioner breached his fiduciary duties "under the partnership agreement". In its bench trial opinion, the District Court relied on the Restatement of Torts (Second) Sec. 874, and made certain findings construing various provisions of the partnership agreement relating to the general partner's authority, and petitioner's employment agreement, and found the petitioner's conduct negligent. *See* 50A-74A. In its opinion on summary judgment, the Court rejected petitioner's contractual defense under the indemnification provision of the partnership agreement, holding that this clause did not apply to legal fees paid on behalf of the partnership where the petitioner had acted negligently. *See* 50A-62A. It is now a generally accepted principle of modern partnership law that the respective rights and duties of the partners are controlled by the terms and conditions of the partnership agreement.[7]

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[7] Specifically with respect to the claim for return of salary payments, the Sixth Circuit held in a *per curiam* decision, that this Court's rulings in *Beacon Theatres* and *Dairy Queen* entitled the defendant in that case to a trial by jury. *National Union Electric Corporation v. Wilson*. 434 F.2d 986, 988 (6th Cir. 1970). At least as to this element of damages, there is a conflict between the Second Circuit and the Sixth Circuit as to application of the Seventh Amendment.

While it is unfortunate that petitioner's counsel in the original bench trial did not seek mandamus or an interlocutory appeal challenging the District Court's denial of petitioner's demand for a jury trial, as was done in the *Beacon Theatres* and *Dairy Queen* cases, this fact alone should not be grounds for denying this petition. *See Lytle v. Household Manufacturing,* 494 U.S. 545, 110 S.Ct. 1331 (1990); *National Union Electric Corporation v. Wilson, supra.*

Nor should the fact that the Court of Appeals affirmed the District Court's summary judgment without opinion be grounds for denying the petition, where the action of the Court of Appeals seems inconsistent with protections already clearly recognized for the important right of trial by jury in this Court's previous decisions. *See. e.g.,* this Court's opinions in *Lytle* and *Dairy Queen;* dissenting opinion of Justice Rehnquist in *Taylor v. McKeithen,* 407 U.S. 191, 195 (1972). Quoting from Justice Marshall's opinion in the *Lytle* case, "Nothing in the record indicates that the court reached the only reasonable conclusions or that a jury could not have found the facts differently and entered a different verdict." 110 S.Ct., at 1338.[8]

[8] The practice of summary dispositions by Courts of Appeal has been criticized, particularly in face of a conflict with another circuit or where an important constitutional precedent is involved. Oberman, *Coping With Rising Caseload: A New Model of Appellate Review,* 46 Brooklyn L. Rev. 841, 855-56 (1980); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals,* 1973 Wash. U.L.Q. 257, 272-73 (1973).

CONCLUSION

Petitioner respectfully prays that, for the reasons indicated above, the Court issue writ of certiorari to review the judgments of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel of Record and Attorney
for petitioner Richard J. Brignoli

February 12, 1992

No. ____

In The

Supreme Court Of The United States

October Term, 1991

RICHARD J. BRIGNOLI
Petitioner,

v.

BATTLE FOWLER, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates, et. al.
Respondent

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Order of the United States Court of Appeals for the Second Circuit, dated November 15, 1991

SDNY
89-cv-8168
POLLACK

JON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of November, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.

BATTLE FOWLER, as Receiver and
Liquidating Trustee of Brignoli,
Curley & Roberts Associates,
Plaintiff-Appellee,

v. 91-7704

RICHARD J. BRIGNOLI,
Defendant-Appellant,

ARIE E. DAVID, BRIGNOLI MODELS, INC.,
Defendants.

ORDER

Appeal from the United States District Court for the Southern District of New York (Milton Pollack, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court by and it hereby is AFFIRMED.

We affirm for substantially the reasons set forth by Judge Pollack in his opinion and decision filed June 18, 1991.

Fowler V. Brignoli
Docket No. 91-7704
Circuit Judges.

Opinion and Decision of the United States District Court for the Southern District of New York, dated June 18, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BATTLE FOWLER, as Receiver and
Liquidating Trustee of BRIGNOLI, ·
CURLEY & ROBERTS ASSOCIATES,
Plaintiff,

89 Civ. 8168 (MP)

- against-

RICHARD J. BRIGNOLI, ARIE E.
DAVID and BRIGNOLI MODELS, INC.,
Defendants.

OPINION AND DECISION

MILTON POLLACK, Senior United States District Judge

Plaintiff Battle Fowler, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates ("BCR"), has filed suit

to recover certain sums paid by BCR to defendants. The Receiver moved for an order pursuant to Rule 56 Fed.R.Civ.P. granting plaintiff summary judgment on three of the four Claims for Relief. For the reasons appearing hereinafter and pursuant to Rule 54(b) Fed.R.Civ.P., summary judgment is granted on the First and Second Claims for Relief and is denied on the Fourth Claim for Relief.

Background

A derivative action entitled *Curley v. Brignoli Curley & Roberts Assoc.*, 88 Civ. 5307 (MP) (the "*Curley* Action") was brought by certain limited partners of BCR against Richard Brignoli; Brignoli & Curley Inc. ("BCI"); and BCR as a necessary party. BCI was BCR's corporate General Partner. Richard Brignoli was majority shareholder, Chief Executive Officer, President and Chairman of the Board of BCI. *Curley v. Brignoli, Curley & Roberts Assoc.*, 746 F. Supp. 1208, 1210-11 (S.D.N.Y. 1989), *aff'd*, 915 F.2d 81 (2d Cir. 1990).

This Court in its post-trial Opinion of August 4, 1989 removed BCI as General Partner of BCR after finding "Richard Brignoli . . . has been guilty of and has caused BCI to be guilty of such crass and autocratic conduct in the service of his selfish interest and in derogation of the interests of the limited partnership so as to affect prejudicially the carrying on of the business as a partnership. . . . The evidence adduced at trial amply established glaring misconduct by Brignoli and BCI." *Id.* Furthermore, this Court found BCR suffered substantial damage as a result of Brignoli's disloyalty including a forfeiture of a $175,000 certificate of deposit and excessive or unwarranted payments to Brignoli and Brignoli Models, Inc. ("BMI"), and that from the time Brignoli fired Curley as BCI's chief officer in December 1987, Brignoli operated BCR to serve only his self-interest until BCI's removal as General Partner in August 1989. *Curley*, 746 F. Supp. at 1215-19.

After a vote in favor of dissolution, the Court entered judgment dated August 28, 1989 ordering dissolution of BCR and appointed Battle Fowler as Receiver.

The Court of Appeals dropped BCR as a party, recharacterized the action as a class action, and affirmed the District Court's decision on the merits. *Curley v. Brignoli, Curley & Roberts Assoc.*, 915 F.2d 81 (2d Cir. 1990).

The Receiver filed the complaint in this action on December 8, 1989 seeking the following relief:

1) First Claim for Relief – against Brignoli for all salary paid Brignoli by BCR while he was in breach of his fiduciary duties, in the amount of $369,229;

2) Second Claim for Relief – against Brignoli for reimbursement of legal costs paid by BCR for the benefit of Brignoli in connection with the *Curley v. Brignoli*, 88 Civ. 5307 (MP), action, in the amount of $367,337.03;

3) Third Claim for Relief – against Arie David for reimbursement of payments made by BCR for legal services that were allegedly not performed, in the amount of $132,500.

4) Fourth Claim for Relief – against Brignoli and BMI, reimbursement in the amount of $159,342.66 for excessive payments made to BMI for "Stock Sleuth", a trading analysis computer program, by reason of Brignoli's self-dealing in engaging BMI.

The Receiver moves for summary judgment on the First, Second, and Fourth Claims for Relief.

Analysis

I. Receiver's Standing and Availability of Collateral Estoppel

Defendants question the Receiver's standing to sue on behalf of BCR in this action since BCR was dropped as a party in the *Curley* Action and argue that the Receiver could only assert claims held by members of the class and not those held by the partnership itself. The gravamen of this assertion is the question whether the District Court had jurisdiction over the partnership in the *Curley* class action such that a Receiver could properly be appointed to represent the partnership's interests.

The Second Circuit's affirmance of this Court's August 4, 1989 Opinion on the merits after recharacterization of the *Curley* derivative action as a class action includes an affirmation of the District Court's appointment of a Receiver to administer the partnership's affairs. *Curley*, 915 F.2d at 92. In addition a court has jurisdiction over an unincorporated association pursuant to Rule 23.2 Fed.R.Civ.P. on the basis of personal jurisdiction over the named class representatives. 7C C. Wright, A. Miller, M. Kane, Federal Practice and Procedure: Civil 2d. §1861 at 216 (1986) (citing cases). There is no question of this Court's personal jurisdiction over the named class representatives and therefore appointment of the Receiver to represent the partnership was appropriate. The Receiver has standing to pursue claims on behalf of BCR in this action.

Defendants' argument against employment of the collateral estoppel doctrine with respect to the issue of forfeiture confuses "issues adjudicated in a prior action" with "ultimate relief". Forfeiture is the ultimate relief sought in this action. The Receiver cited this Court's findings concerning the level and extent of misconduct and breach of fiduciary duty. These issues were actually litigated and decided at the Bench Trial preceding the August 4, 1989 decision, *Curley*, 746 F. Supp. at 1215-19; there was a full and fair opportunity for litigating these issues, *Id.* at 1213-14; and these issues were necessary to support the

judgment of this Court, *Id.* at 1221.22. *Lawlor v. National Screen Service,* 348 U.S. 322, 326 (1955). Finally, the disposition of these issues at a Bench Trial does not preclude offensive use in a subsequent jury proceeding. *Parklane Hosiery v. Shore,* 439 U.S. 322 (1979).

The Receiver's assertion of the collateral estoppel doctrine is therefore appropriate in this action with respect to this Court's previous findings regarding Brignoli's self-dealing.

II. Recovery of Brignoli's Compensation

A general partner owes a fiduciary duty to the limited partners and is obligated to conduct the partnership's affairs with the utmost good faith, and loyalty. *Tucker Anthony Realty Corp. v. Schlessinger,* 888 F.2d 969, 972-73 (2d Cir. 1989). The functions, rights and duties of partners are those of agents and the law of agency is applicable. *King v. Sarria,* 69 N.Y. 24 (1877); *Mitchell v. Reed,* 61 N.Y. 123 (1874); 16 N.Y. Jur. 2d §1377 at 87 (1981). If an agent is in breach of this fiduciary duty, a partnership may recover compensation paid to its agent during the period of disloyalty. *Wechsler v. Bowman,* 285 N.Y. 284 (1941); 3 N.Y. Jur.2d §215 at 41 & n.12 (citing cases). Where compensation is capable of apportionment, either as to time or as to specific tasks, the Second Circuit has interpreted the modern trend of New York law to require apportionment of forfeitures to periods of disloyalty. *Musico v. Champion Credit Corp.,* 764 F.2d 192, 112-14 (2d Cir. 1985) (Pratt, C.J.).

Defendants argue, in effect, for the apportionment of salary to permit retention of compensation for every beneficial act Brignoli provided BCR, or alternatively, would want the Receiver to show that a particular biweekly period was a time of disloyalty or a time of benefit to BCR. Defendants cite no authority for the proposition that apportionment of compensation is required for beneficial services performed within a period of disloyalty. On the contrary, the Second Circuit in *Musico* noted an exception to compensation apportionment

where "breaches of duty . . . had tainted all the dealings between the parties" such that the old New York rule of absolute forfeiture was applicable notwithstanding benefits received by the principal. *Musico*, 764 F.2d at 114 (citing *Trounstine v. Bauer, Pogue & Co.*, 144 F.2d 379, 383 (2d Cir.), *cert. denied*, 323 U.S. 777 (1944)).

The "extreme level of gross misconduct and arbitrary management . . . committed by Brignoli", found by this Court in its August 4, 1989 decision, had tainted all dealings with BCR from late 1987 through August 1989. *Curley*, 736 F. Supp. at 1221. Brignoli placed himself on BCR's payroll in January 1988, *Id.* at 1218; defendants do not dispute the amount of compensation paid to Brignoli in 1988 and 1989. The Receiver is entitled to summary judgment on the First Claim for Relief and shall recover the sum of $369,229 with interest from October 27, 1989 at the rate of 9% as provided by law.

III. Recovery of Legal Fees Paid for the Benefit of Brignoli

Section 4.3 of the Partnership Agreement provides in relevant part:

> The Partnership shall indemnify and save harmless the General Partner from and against any and all liability, loss, cost, expense or damage incurred or sustained in the conduct of the business of the Partnership within the scope of the authority conferred by this Agreement; provided, however, that the General Partner shall not be entitled to any indemnification in the event any such liability, loss, costs, expense or damage is incurred or sustained as a result of the General Partner's gross negligence, willful misconduct or recklessness.

Curley, 746 F. Supp. at 1220 (quoting Partnership Agreement).

Apportionment of fees between the third-party claims and the main breach of fiduciary duties action is unncecssary. The third-party claims overlapped with the affirmative defenses asserted by Brignoli and BCI and were part of the defense strategy of such defendants and not separate actions. *Curley*, 746 F. Supp. at 1213, 1220 ("BCI and BMI had mingled their third-party claims against Brick and Bennett with their counterclaims against the BCR limited partners"; Second, Third, Sixth Counterclaims overlapped with Brick and Bennett claims).

Apportionment of legal costs as between BCI and Brignoli that were paid for the benefit of BCI and Brignoli is also unnecessary. The distinction between BCI and Brignoli is artificial since Brignoli is the majority shareholder of BCI, its Chief Executive Officer, President and Chairman of the Board. *Id.* at 1210-11. This Court had found that Brignoli committed his breach of fiduciary duty to BCR through the entity of BCI, *Id.* at 1221, and the Opinion does not differentiate between the acts of BCI versus the acts of Brignoli. Apportionment is, therefore, unnecessary between BCI and Brignoli.

Brignoli is not entitled to indemnification for legal costs pursuant to the terms of the Partnership Agreement and as a result of the Court's findings it its August 4, 1989 Opinion as to Brignoli's gross misconduct, bad faith and pursuit of self interest to the detriment of the partnership. Defendants do not dispute the total amount of legal fees paid by BCR in connection with the *Curley* Action. The Receiver is entitled to summary judgment on its Second Claim for Relief and shall recover in the amount of $367,337.03 with interest from October 27, 1989 at the rate of 9% as provided by law.

IV. Recovery of Overcharges for Stock Sleuth

Testimony was provided by two experts at the Bench Trial in the *Curley* Action that Stock Sleuth could be recreated for a sum of $74,000 to $80,000. 746 F. Supp. at 1216. These figures did not include the expense of formulating the parameters for

the study. *Id.* at n.4. Whether $20,000-$26,000 (the difference between $100,000, the maximum figure urged by Receiver for the cost of the services, and the figures elicited at trial) is sufficient to cover the cost of formulating parameters of the study is a disputed issue of material fact. In addition, BMI was not a named party in the *Curley* Action. Offensive collateral estoppel is not available as to it unless the Court finds BMI was an alter ego of Brignoli. Such a finding was not mentioned in the *Curley* Opinion. *Summary judgment is denied with respect to the Fourth Claim of Relief.*

CONCLUSION

A judgment shall be entered in favor of Battle Fowler, as Receiver, who shall recover from the defendant Richard J. Brignoli the sum of $369,229 with interest thereon amounting to $54,534.62, together with $367,337.03 with interest thereon amounting to $54,255.18, and costs to be taxed by the Clerk.

It is expressly determined that there is no just cause for delay and the Clerk is directed to enter such judgment on the First and Second Claims for Relief in the Complaint in favor of plaintiff and against Richard J. Brignoli for said amounts pursuant to Rule 54(b) Fed.R.Civ.P.

Dated: June 18, 1991

/s/ Milton Pollack
Senior U.S. District Judge

SO ORDERED

Order of the Supreme Court of the United States, Denying Petition for Writ of Certiorari, dated April 1, 1991

No. 90-1242. Brignoli & Curley, Inc., et al., Petitioners v John J. Curley, et al.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Justice White would grant certiorari.

Same case below, 915 F.2d 81.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1129, 1130—August Term, 1989

(Argued: April 12, 1990 Decided: September 20, 1990)

Docket Nos. 89-7979, 89-9247

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiffs-Appellees,

—v.—

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership; BRIGNOLI & CURLEY, INC., and RICHARD BRIGNOLI,

Defendants,

BRIGNOLI & CURLEY, INC., and RICHARD BRIGNOLI,

Defendants-Appellants,

BRIGNOLI MODELS, INC.,

Appellant.

Before:

LUMBARD, FRIEDMAN,* and MAHONEY,
Circuit Judges.

Appeals from judgments entered after a nonjury trial in the United States District Court for the Southern District of New York, Milton Pollack, *Judge*. Finding breaches of fiduciary duty, the district court ordered dissolution of a limited partnership pursuant to removal of its corporate general partner, and awarded damages against the principal of that general partner.

Appellants contend that diversity jurisdiction has been destroyed by the intervening decision of the Supreme Court in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990). We conclude, however, that *Carden* does not preclude diversity jurisdiction on the facts presented herein. We therefore affirm and remand.

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MAHONEY, *Circuit Judge*:

This appeal is taken from a judgment of the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, ordering dissolution of a limited partnership, the removal of its general partner, and awarding damages occasioned by the misappropriation of an asset of the partnership.

During the pendency of this appeal, the Supreme Court determined, in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), that in a federal action to which a limited partnership is a party, the citizenship of limited partners must be taken into account to determine whether there is diversity of citizenship among the parties. We recharacterize plaintiff's lawsuit as a class, rather than a derivative, action, and dismiss the limited partnership as a party defendant on the authority of *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989), and Fed. R. Civ. P. 21. We then confirm the existence of subject matter jurisdiction, affirm on the merits for the reasons stated in the opinion of the district court, and remand.

Background

A. *The Parties.*

Brignoli, Curley & Roberts Associates ("BCR") is a Delaware limited partnership with its principal place of business in New York. The sole general partner of BCR is defendant Brignoli & Curley, Inc. ("BCI"), a Delaware corporation whose principal place of business is also in New York. On December 14, 1987, defendant Richard Brignoli ("Brignoli") became chief executive officer of BCI and assumed control of the day-to-day business operations of BCR. Brignoli's citizenship was disputed below; plaintiffs claim that he is a citizen of New York, while defendants attribute Connecticut citizenship to him.[1] Brignoli, as trustee, owns 50.1% of BCI's stock, and the remainder is owned by plaintiff John J. Curley ("Curley").

The limited partners of BCR include Curley and plaintiff James Karanfilian ("Karanfilian"), both citizens of New Jersey, former plaintiff Duane Roberts ("Roberts"),[2] a citizen of Connecticut, and Brignoli Models, Inc. ("BMI"), a Delaware corporation of which Brignoli is the chairman and chief executive officer. Brignoli owns a majority of BMI's stock. Curley, Karanfilian, and Roberts collectively own approximately thirty-six percent of the equity of BCR, and BMI owns approximately fifty-four percent. The balance of the

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1 This issue subsequently became irrelevant in the district court, *see infra* note 2, and is also irrelevant to our disposition of this appeal.

2 Roberts, originally a named plaintiff, was dismissed as a party on plaintiffs' motion, pursuant to Fed. R. Civ. P. 21, in order to prevent a challenge to diversity jurisdiction based upon Roberts' Connecticut citizenship. We consider extensively hereinafter the propriety of dismissal of parties in this case pursuant to rule 21.

equity of BCR is owned by other limited partners of BCR.

B. *The Proceedings Below.*

Curley, Karanfilian, and Roberts commenced this action on July 29, 1988, invoking diversity of citizenship as the basis of federal subject matter jurisdiction. They alleged various breaches of fiduciary duty by BCI as the general partner of BCR and by Brignoli as the person in control of BCI, and sought: (1) removal of BCI as general partner of BCR or, in the alternative, the dissolution of BCR; (2) judgment against Brignoli and BCI in favor of BCR for damages in compensation for breaches of fiduciary duty by Brignoli and BCI; and (3) an accounting as to BCR. BCR, BCI, and Brignoli were named as defendants.

Following a bench trial, the district court found that BCI and Brignoli had indeed engaged in improper self-dealing. Among the findings were that BCI and Brignoli wrongfully refused plaintiffs access to BCR's books and records, and that Brignoli misappropriated a $175,000 certificate of deposit from BCR, pledging it to secure a loan to BMI. Pursuant to its opinion dated August 4, 1989, and judgments entered thereon, the district court granted, *inter alia*, the following relief: 1) removal of BCI as general partner of BCR; 2) prohibition of BMI from voting its interest in BCR in a subsequent vote by the limited partners (pursuant to the partnership agreement) on whether to replace BCI with a new general partner or to dissolve BCR; 3) after a vote in favor of dissolution, entry of judgment ordering dissolution of BCR under the direction of the law firm Battle Fowler as receiver and liquidating trustee; and (4) entry of judg-

ment against Brignoli and in favor of BCR for the damages occasioned by Brignoli's misappropriation of BCR's certificate of deposit.

This appeal followed.[3]

Discussion

A. *The Diversity Problem.*

The merits of this appeal need not detain us. The district court's thorough opinion convincingly resolves the questions of fiduciary duty and self-dealing tendered by the parties, and there is no need for an appellate rehash of those fact-specific issues.

A significant question of subject matter jurisdiction (indeed, the only question addressed in the oral argument of this appeal), however, is posed by a decision of the Supreme Court, *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), which was rendered on February 27, 1990, during the pendency of this appeal. *Carden* answered in the affirmative "[t]he question . . . whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S. Ct. at 1016. The opinion subsequently specified that "diversity jurisdiction in a suit *by or against* [a limited partnership] depends on the citizenship of 'all the members' . . . ." *Id.* at 1021 (emphasis

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3 In a related case, this court affirmed a summary judgment of the United States District Court for the Southern District of New York that awarded $150,000 plus interest to Curley against BMI, based upon a loan agreement which required BMI to repay $150,000 to Curley on or before June 30, 1989 "out of . . . the profits paid" to BMI by BCR. *See Curley v. Brignoli Models, Incorporated*, No. 90-7033 (2d Cir. May 7, 1990).

added) (quoting *Chapman v. Burney*, 129 U.S. 677, 682 (1889)).

Since we must decide this appeal on the basis of the law existing at the time of our decision, *see Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Hegger v. Green*, 646 F.2d 22, 26 (2d Cir. 1981), and since subject matter jurisdiction is an unwaivable *sine qua non* for the exercise of federal judicial power, *see Carden*, 110 S. Ct. at 1021 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); Fed. R. Civ. P. 12(h), we must give careful attention to the jurisdictional question posed by *Carden*.

That question arises against the background of the complete-diversity rule first articulated in *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), which establishes that in order to invoke diversity jurisdiction under 28 U.S.C. § 1332 (1988), the plaintiffs must show that none of them shares citizenship with any defendant. Until *Carden*, the long-standing rule in this circuit was that, in proceedings where a limited partnership was a party but its limited partners could not properly be joined under state law, only the citizenship of general partners was considered for diversity purposes.

This rule was stated in *Colonial* as follows:

> [T]he citizenship of a limited partnership was not sufficiently made out for diversity purposes by alleging the state of its organization, even though state law permitted the partnership to sue or be sued in the firm name. But . . . where, as here,

> there was diversity between the plaintiff and all the general partners of the defendant, identity of citizenship between the plaintiff and a limited partner was not fatal because under the applicable New York statute a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." N.Y. Partnership Law § 115. In the absence of a claim of insolvency of the partnership, a suit brought against a New York partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destoy [sic] diversity.

358 F.2d at 183-84 (case citations and footnote omitted).

Admittedly, there existed some doubt as to whether the *Colonial* rule governed derivative suits brought by limited partners against their limited partnership. *Compare Pappas v. Arfaras*, 712 F. Supp. 307, 309-11 (E.D.N.Y. 1989) (considering limited partners' citizenship and thus destroying diversity), *with Tucker Anthony Realty Corp. v. Schlesinger*, No. CV-88-0868, slip op. at 6-8 (E.D.N.Y. June 16, 1989) (disregarding diversity-destroying citizenship of limited partners). Nevertheless, it was at least a plausible reading of *Colonial* that the citizenship of limited partners was not attributable to the partnership even when the partnership was named as a party to a derivative suit.

Curley and Karanfilian, citizens of New Jersey, shared citizenship with neither BCI (the sole general partner of BCR), of Delaware and New York, nor Brignoli, of either New York or Connecticut. BCR was also named

as a defendant, but so long as BCR could be deemed to have the citizenship of its general partner only, diversity would exist. If, on the other hand, the citizenship of BCR's limited partners were attributable to BCR as well, diversity would be lacking, because the New Jersey citizenship of Curley and Karanfilian would then be present on both sides of the case. *See, e.g., Phillips v. Kula 200*, 83 F.R.D. 533 (D. Haw. 1978) (no diversity jurisdiction where limited partners sued partnership; citizenship of plaintiff partners attributed to partnership, destroying diversity).

In a prejudgment attack on the district court's assertion of diversity jurisdiction, defendants never sought to attribute the limited partners' New Jersey citizenship to defendant BCR. *See supra* note 1. At the oral argument of this appeal, however, defendants invoked *Carden*, correctly contending that *Carden* destroys plaintiffs' diversity scenario because plaintiffs' New Jersey citizenship is also attributed to defendant BCR.

The invalidity of plaintiffs' theory of diversity, however, does not end our inquiry. This court must liberally construe plaintiffs' complaint "to determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded." *New York State Waterways Ass'n v. Diamond*, 469 F.2d 419, 421 (2d Cir. 1972). Further, there is a developing consensus that a circuit court may look to unpleaded bases of federal subject matter jurisdiction. *See Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1515 (9th Cir. 1987) ("we are not limited to the jurisdictional statutes identified in the complaint"); *Hahn v. United States*, 757 F.2d 581, 587 (3rd Cir. 1985) (same); *see also* 5 C. Wright & A. Miller, Federal Practice and Procedure

§ 1206, at 91 (2d ed. 1990) ("the court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction other than one that has been improperly asserted"); *cf.* 28 U.S.C. § 1653 (1988) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."). Regarding the particular problem presented here, we have espoused "the proposition that a jurisdictionally defective complaint can be regarded as satisfactorily amended if the record as a whole establishes the existence of the required diversity of citizenship between the parties." *Baer v. United Servs. Auto. Ass'n*, 503 F.2d 393, 397 (2d Cir. 1974).

Recognizing our "obligation to explore any promising avenue to the District Court's jurisdiction, whether or not it is suggested by the parties," *Association of Am. Medical Colleges v. Califano*, 569 F.2d 101, 111 (D.C. Cir. 1977), we first inquire whether plaintiffs could have brought a class, rather than derivative, action against BCI and Brignoli, pursuant to Fed. R. Civ. P. 23.2. Second, we examine our authority to recharacterize the derivative claim as a class claim, a question largely governed by 28 U.S.C. § 1653 (1988). Finally, we consider whether, in the event of such recharacterization, BCR may be considered a dispensable party pursuant to Fed. R. Civ. P. 19 and accordingly may be dropped as a party at this juncture in the litigation, thus establishing diversity of citizenship and sustaining subject matter jurisdiction. Deciding all three issues in plaintiffs' favor, we confirm the existence of subject matter jurisdiction, affirm on the merits, and remand.

B. *The Availability of a Class Action.*

As previously discussed, BCR's diversity-breaking role as a party to this action is occasioned by the derivative nature of the action brought by the limited partner plaintiffs. Curley and Karanfilian could have avoided joining BCR by bringing their claim as plaintiffs suing on behalf of a class of limited partners of BCR. Fed. R. Civ. P. 23.2 provides in pertinent part:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members.

The language of rule 23.2 specifies only one prerequisite to class treatment, fair and adequate representation. The gravamen of the complaint in this case, amply supported by the trial record, is that the general partner, BCI, and its controlling shareholder, Brignoli, looted BCR for Brignoli's benefit. All of the limited partners have an identical interest, as does BCR, in terminating that course of conduct and obtaining recompense from BCI and Brignoli for the harm done by them to BCR. Curley, Karanfilian and Roberts (until his dismissal as a plaintiff) not only were capable of fairly and adequately representing that interest; they in fact did so.

BMI is the only limited partner that could arguably disclaim their representation. BMI, however, a corporation of which Brignoli was the principal, was part and parcel of the scheme to plunder BCR for Brignoli's benefit. It would be ludicrous to read rule 23.2 to disqualify the plaintiffs here as proper representatives of the BCR

limited partners because they do not fairly represent a limited partner participating in a scheme for the spoilation of BCR at the expense of the class (excluding BMI) of limited partners.

This issue was addressed in *Lefebvre v. Kelly*, No. 83 CV 3211 (ERK) (E.D.N.Y. May 21, 1987), in the following terms:

> Defendants also contend that a class action cannot be certified in this case because the interests of the designated class representatives are antagonistic to those of the individual defendants who claim to continue to be members of the Society. While it is obvious that such antagonism exists by virtue of the fact that the individual defendants have been sued by the plaintiff class, this will not defeat the class action procedure on the facts of this case.
>
> The purpose underlying the requirement that class representatives fairly and adequately represent the interests of those not appearing is to afford the protection to absent parties which due process requires. Hansberry v. Lee, 311 U.S. 32 (1940). There can be no question in this case but that the interests of the individual defendants are adequately protected. In addition to being named in an individual capacity, the individual defendants serve as directors of the various corporate defendants in this case. When the interests of antagonistic class members are adequately represented by the class' opponents, the requirements of due process are satisfied such that a class can be certified. Horton v. Goose Creek Independent School District, 677 F.2d 471 (5th Cir. 1982); Dierks v. Thompson, 414 F.2d 453 (1st Cir.

1969); Stolz v. United Brotherhood of Carpenters and Joiners, 620 F. Supp. 396 (D. Nev. 1985).

Id., slip op. at 8-9.

We consider the prerequisites to class certification contained in Fed R. Civ. P. 23(a), such as the requirement that the class be "so numerous that joinder of all members is impracticable," to be inapplicable to a rule 23.2 class action. While there is some disagreement on this point,[4] the more persuasive reasoning supports this interpretation. Rule 23.2 expressly refers to subdivisions (d) and (e) of rule 23 when incorporating the provisions of rule 23 with respect to orders regarding the conduct of class actions, subdivision (d), and dismissal or compromise, subdivision (e). It would therefore seem that if the drafters sought to incorporate the requirements of subdivision (a) of rule 23, as well, they would have done so expressly. Indeed, the advisory committee note specifies that rule 23.2 deals "separately" with actions under its purview, "referring *where appropriate* to Rule 23." Fed. R. Civ. P. 23.2 advisory committee's note (emphasis added).

We are aware that some courts have adopted the view that a class action under rule 23.2 may be brought only if the state in which the district court sits has denied the

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4 *Compare Management Television Systs. v. National Football League*, 52 F.R.D. 162, 164 (E.D. Pa. 1971) (rejecting applicability of numerosity requirement of rule 23(a) to rule 23.2 class action) *and* 7C C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1861, at 221-22 (2d ed. 1986) (no reason to read rule 23(a) requirements, other than fair and adequate representation, into rule 23.2) *with Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D.P.R. 1971) (apparent that "the same prerequisites contained in Rule 23 for a class action are also required for actions under Rule 23.2").

association the requisite capacity to be a party to the suit. *See, e.g., Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 900 F.2d 476, 478-79 (1st Cir. 1990) (rule 23.2 does not authorize suit against members as a class where state law allows association to be sued as an entity); *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D.P.R. 1971) (same); *see also Patrician Towers Owners, Inc. v. Fairchild*, 513 F.2d 216, 220-21 (4th Cir. 1975) (noting *Suchem*'s restrictive interpretation of 23.2 but not reaching the issue); *Peerless Ins. Co. v. Aetna Casualty & Sur. Co.*, 735 F. Supp. 452, 455 (D. N.M. 1990) (following *Northbrook* as governing circuit precedent). This interpretation stems from the following advisory committee comment:

> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b).

Fed. R. Civ. P. 23.2 advisory committee's note.

Rule 17(b) provides in relevant part:

> [C]apacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right under the Constitution or laws of the United States . . . .

Fed. R. Civ. P. 17(b). *Northbrook* reads the committee note as an instruction that the *sole* purpose of rule 23.2 is to provide capacity where none exists under state law. Under this reasoning, rule 23.2 is unavailable to limited partners in a federal district court sitting in New York because the partnership has capacity as an entity under state law. *See* N.Y. Civ. Prac. L. & R. 1025 (McKinney 1976).

We disagree with this restrictive interpretation. It must be remembered that the class action mechanism provides litigants with important procedural advantages. For example, class status may expand the number of districts where venue is proper, *see Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 139-40 (7th Cir. 1974); may permit a party to litigate the rights of class members not within the court's personal jurisdiction, *see Calagaz v. Calhoon*, 309 F.2d 248, 253-54 (5th Cir. 1962); or may allow a plaintiff to name as representatives only those association members whose citizenship will not disturb diversity jurisdiction, *see Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365-66 (1921). If the drafters of rule 23.2 intended to provide only a vehicle for capacity, it seems that they would have simply extended to the diversity realm rule 17(b)'s grant of association capacity in federal question cases.

Further, even if the drafters felt compelled to grant capacity in an indirect manner, perhaps to avoid *Erie* problems in circumventing state capacity limitations, a restrictive interpretation of rule 23.2 does not follow. The more reasonable interpretation is that the drafters, having found it necessary to grant advantageous proce-

dures in states which restrict association capacity,[5] would make those procedures available in all district courts. If they intended the anomaly that the availability of class actions would turn on state capacity laws, the drafters could have so provided in the text of rule 23.2. Accordingly, we agree with those courts that have refused to impose such an interpretation upon the advisory committee note. *See, e.g., Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 719-20 (5th Cir. 1980); *Lefebvre v. Kelley*, No. 83 CV 3211 (ERK), slip op. at 6-7 (E.D.N.Y. May 21, 1987); *Lumberman's Underwriting Alliance v. Mobil Oil Corp.*, 612 F. Supp. 1166, 1170 (D. Idaho 1985); *see also* 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1861, at 223 (2d ed. 1986) (reading advisory committee note to support "the view that Rule 23.2 is a procedural device that provides a supplementary method for unincorporated associations to litigate in a federal court") (citing *Lumberman's Underwriting Alliance*).

We conclude that plaintiffs could have brought a rule 23.2 class action, rather than a derivative suit, and next examine our authority thus to recharacterize plaintiffs' action at this stage in the proceedings.

C. *Recharacterization of the Derivative Action as a Class Action.*

There is no diminution in plaintiffs' substantive rights against defendants if their claim is characterized as seeking class, rather than derivative, relief. Fed. R. Civ. P.

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5 We note in this regard that while New York allows an association or partnership to sue in its own right, *see* N.Y. Civ. Prac. L. & R. 1025 (McKinney 1976), it also allows limited partners to bring a class action pursuant to *id.* 1005(a), *see Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 534, 223 N.E.2d 869, 872, 277 N.Y.S.2d 377, 381-82 (1966).

17(b) provides that in the case of an individual acting in a representative capacity, "capacity to sue or be sued shall be determined by the law of the state in which the district court is held," in this case New York. Under New York law, the question whether a suit should be brought as a class action or derivatively turns on the relief sought. *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 534-37, 223 N.E.2d 869, 872-74, 277 N.Y.S.2d 377, 381-84 (1966), held that a class action on behalf of all limited partners properly may redress breaches of fiduciary duty by general partners, while *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 546, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966), held that suit was "properly" brought derivatively, rather than on behalf of all limited partners as a class, where the partnership had refused to enforce its claim against a third party. As this distinction has survived New York's codification of a limited partners' right to sue derivatively, *see* N.Y. Partnership Law § 115-a (McKinney 1988) (added by 1968 N.Y. Laws ch. 496, § 3); *Alpert v. Haimes*, 64 Misc. 2d 608, 609-10, 315 N.Y.S.2d 332, 334-36 (Sup. Ct. 1970); *see also Westchester Religious Inst. v. Condren*, 123 A.D.2d 352, 355, 506 N.Y.S.2d 364, 366 (2d Dep't 1986), it seems that plaintiffs arguably ought to have brought a class action wholly aside from considerations as to diversity jurisdiction.

The question, then, is whether we can recharacterize their claim at this late date. Under 28 U.S.C. § 1653 (1988), "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." "[U]sually the section is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist." *John Birch Society v. National Broadcasting*

Co., 377 F.2d 194, 198-99 (2d Cir. 1967). Since the only question of any consequence presented by the class/derivative dichotomy in this case is the jurisdictional issue, we conclude that section 1653 authorizes us to effect the requisite amendment.

As the Seventh Circuit recently said:

> When, as here, the merits have already been decided and factual questions do not need to be resolved regarding prejudice to the correctly named defendant, it would be a meaningless gesture to remand so that the plaintiff could amend its pleading under Rule 15 of the Federal Rules of Civil Procedure. Instead the sensible course is for this Court to permit amendment under 28 U.S.C. § 1653.

International Bhd. of Boilermakers v. Local Lodge D354, 897 F.2d 1400, 1402 (7th Cir. 1990).

The district court tried the issue of the defendants' wrongful acts, concluding that defendants had engaged in massive breaches of their fiduciary duty to BCR. Defendants are not prejudiced by the proposed amendment, because no substantive or procedural disadvantage attaches to defending against the class of BCR's limited partners as opposed to defending a derivative suit. Accordingly, we recharacterize plaintiffs' derivative action as one seeking class relief. We thus reach the final issue: whether, following that recharacterization, BCR may be dismissed as a party at this juncture.

D. *Dismissal of BCR as a Party.*

Recently, the Supreme Court ratified the predominant view that circuit courts have the power, even after judgment has been rendered below, to dismiss a dispensable

party whose presence prevents statutory diversity jurisdiction.[6] *See Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2220 (1989). This authority is founded not upon 28 U.S.C. § 1653 (1988), which allows only the correction of faulty *allegations* of jurisdiction, *see* 109 S. Ct. at 2222-23, but rather upon Fed. R. Civ. P. 21, which states in pertinent part: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party *or on its own initiative at any stage of the action and on such terms as are just*." *Id.* (emphasis added).

The Court warned that this "authority should be exercised sparingly," and that "the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." 109 S. Ct. at 2226. We have previously noted the absence of prejudice resulting from the dismissal of BCR. On the contrary, dismissal is particularly appropriate in this case, because it spares plaintiffs the prejudice otherwise occasioned by an unforeseeable change in the law invalidating a long-standing jurisdictional precedent of this court, without impacting in any unfairly adverse manner upon defendants.

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6 In the absence of BCR, the remaining plaintiffs and defendants would be diverse. Given the recharacterization of the action as a class action, Curley and Karanfilian would then represent the class of limited partners (other than BMI), and the citizenship of the other limited partners therefore would not be taken into account for diversity purposes. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); *In re "Agent Orange" Prod. Liab. Litigation MDL No. 381*, 818 F.2d 145, 162 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3606, at 424 (2d ed. 1984).

The question whether a party may be dismissed from an action is essentially governed by Fed. R. Civ. P. 19,[7] which was authoritatively construed by the Supreme Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). In that case, the Third

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7 Fed. R. Civ. P. 19 provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Circuit had dismissed a diversity action arising from an automobile accident for want of subject matter jurisdiction on the basis that the owner of the automobile, not named as a defendant in the case, was an indispensable party within the meaning of rule 19(b), thus destroying diversity. *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Casualty Co.*, 365 F.2d 802 (3d Cir. 1966) (in banc), *rev'd sub nom. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

The Supreme Court reversed. The Court noted that "[t]he optimum solution, an adjudication . . . that would be binding on all interested persons, was not 'feasible' [*see* the captions of subdivisions (a) and (b) of rule 19], for [the owner of the vehicle] could not be made a defendant without destroying diversity." 390 U.S. at 108. The Court then framed and decided the resulting issue as follows:

> Hence the problem was the one to which Rule 19(b) appears to address itself: in the absence of a person who "should be joined if feasible," should the court dismiss the action or proceed without him? Since this problem emerged for the first time in the Court of Appeals, there were also two subsidiary questions. First, what was the effect, if any, of the failure of the defendants to raise the matter in the District Court? Second, what was the importance, if any, of the fact that a judgment, binding on the parties although not binding on [the absent defendant], had already been reached after extensive litigation? The three questions prove, on examination, to be interwoven.
>
> We conclude, upon consideration of the record and applying the "equity and good conscience" test

> of Rule 19(b), that the Court of Appeals erred in not allowing the judgment to stand.

Id. at 108-09.

The Court went on to emphasize that at the appellate stage of a litigation, successful plaintiffs' "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum," *id.* at 112; to specify that "[w]hether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of a particular litigation," *id.* at 118; and to express its approval of circuit court cases that "demonstrate close attention to the significant pragmatic considerations involved in the particular circumstances, leading to a resolution consistent with practical and creative justice," *id.* at 119 n.16.

Citing *Provident Tradesmens*, we recently stated:

> As an alternative to dismissal, a court should take a flexible approach when deciding what parties need to be present for a just resolution of the suit. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). The phrase "good conscience" implies a careful and constructive consideration of those parties that are necessary to the litigation. As a consequence, very few cases should be terminated due to the absence of nondiverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible.

Jaser v. New York Property Ins. Underwriting Ass'n, 815 F.2d 240, 242 (2d Cir. 1987); *see also Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 496-98 (2d Cir. 1977); 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1610, at 147-48 (2d ed. 1986).

Here, as in *Provident Tradesmens*, BCR is a party which, within the meaning of rule 19(a), should be joined "if feasible," but whose joinder would destroy diversity. We must therefore apply the teaching of *Provident Tradesmens* and the criteria of rule 19(b) to the facts presented here to determine whether BCR should be dismissed as a party to preserve diversity of citizenship. Accordingly, we briefly review the four factors which rule 19(b) requires "to be considered," in the order stated in the rule: (1) a judgment rendered in BCR's absence will not be prejudicial to BCR or to any of its limited or general partners; (2) the district court can, by shaping the future relief in this action, address and alleviate any anomalies or inconsistencies that would otherwise result from the absence of BCR as a party, especially since all the limited partners (through the class representatives)[8] and the general partner of BCR will be before the district court; (3) again because of the presence of the limited and general partners of BCR, a judgment rendered in its absence will be adequate; and (4) plaintiffs will not have an adequate remedy if their action is dismissed for nonjoinder, since they would then have to commence a new action in state court, foregoing the relief to which they are justly enti-

8 As indicated earlier herein, the class representatives do not represent BMI, which is not otherwise a party to this litigation, but BMI's principal, Brignoli, is a named defendant. BMI joined the notice of appeal filed by BCI and Brignoli herein as "an aggrieved party," and is accordingly listed in the caption of this appeal as an appellant.

tled after the proceedings herein in the district court, and risking further transgressions by Brignoli and BCI during the course of the new litigation.

We recognize that in *Sixth Geostatic Energy Drilling Program 1980 v. Ancor Exploration Co.*, 544 F. Supp. 297, 298-99 (N.D. Okla. 1982), the court ruled that limited partnerships should be added as parties defendant in an action that sought to put them into receivership, even though their general partners were already parties to the lawsuit. The court ruled, however, that the addition of the limited partnerships did not spoil diversity, *id.* at 299-305, and reserved the question whether, if their addition would preclude diversity, they would then be dropped as parties in reliance upon rule 19(b), *id.* at 299 n.1. In both *DM II, Ltd. v. Hospital Corp. of America*, 130 F.R.D. 469 (N.D. Ga. 1989), and *Camden Securities. Co. v. Lupowitz*, 500 F. Supp. 653 (E.D. Pa. 1980), on the other hand, the court dismissed an action between the members of a partnership where the partnership had not been joined as a party, resolving a rule 19(b) analysis adversely to diversity jurisdiction.

It is noteworthy, however, that in both *DM II* and *Camden Securities*, the cases were in a pretrial posture, and the same controversies were the subject of ongoing, parallel state court litigation. In *DM II*, moreover, the court emphasized its inability to "fashion complete relief in the absence of all partners," 130 F.R.D. at 475, noting that "[j]oinder of each non-party partner would ordinarily satisfy Rule 19, since the interests of the partnership would be adequately represented," *id.* at 473 n.5.

VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership, 727 F. Supp. 1167, 1169-71 (N.D. Ill.

1989), explicitly disagreed with *Camden Securities*, ruling that although the case was in its initial stages, a rule 19(b) analysis required the conclusion that a joint venture was not an indispensable party since "both joint venturers were present before the court, and . . . complete relief could be fashioned in the absence of the Joint Venture." *Id.* at 1171. The court cited in support of its ruling *Godine & Stunda, Inc. v. Reading Station Assocs. Ltd. Partnership*, No. Civ. 89-0514 (E.D. Pa. May 4, 1989), and *Whitney v. Citibank, N.A.*, No. 81 Civ. 5832 (CBM) (S.D.N.Y. Apr. 19, 1985), both cases in which a partnership was determined not to be an indispensable party in litigation where the partners were parties.

Whitney, the only one of the cited cases to consider the rule 19(b) question in a post-trial posture, is particularly relevant here. Noting that "there would be great prejudice to [plaintiff] to force him to relitigate this complex case at great expense, particularly when the court has already found that his rights were wilfully violated by defendants," slip op. at 11-12, the court concluded that "[t]o dismiss the present action because a dissolved partnership, which holds no meaningful assets and whose partners are all before the court, cannot be joined as a party would be to exalt form over substance and frustrate the intent of Rule 19," *id.* at 12.

Although *Provident Tradesmens* teaches that the proper resolution of a rule 19(b) question "can only be determined in the context of particular litigation," 390 U.S. at 118, *Whitney* appears to be the most closely analogous precedent to the situation presented herein. In any event, addressing the particularities of this litigation, we see no reason, at this belated juncture, to pro-

vide BCI and Brignoli with "a windfall escape from [their] defeat at trial." *Provident Tradesmens*, 390 U.S. at 112. "After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent." *Id.* at 111. Further, plaintiffs' "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum." *Id.* at 112.

We accordingly conclude that BCR may be dropped as a party defendant, confident that the district court, with all the partners before it,[9] will be able to deal with any resulting difficulties "by protective provisions in the judgment, by the shaping of relief, or by other measures." Fed. R. Civ. P. 19(b).

Conclusion

For the foregoing reasons, we recharacterize this lawsuit as a class, rather than a derivative, action, and dismiss BCR as a party. We then confirm the existence of subject matter jurisdiction. Having done so, we affirm the judgments of the district court on the merits for the reasons stated in the opinion of the district court, and remand for further proceedings not inconsistent with this opinion.

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9 *See supra* note 7.

Opinion and Decision of the United States District Court for the Southern District of New York, dated August 4, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiffs, 88 Civ. 5307 (MP)

– against – JUDGMENT

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC. and RICHARD BRIGNOLI,

Defendants.

OPINION AND DECISION

MILTON POLLACK, Senior United States District Judge

Overview

This phase of the litigation between the parties seeks the equitable intervention of this Court in a partnership dispute. Plaintiffs, limited partners, claim defendants, the

General Partner and its Chief Executive Officer, breached their fiduciary duties, misappropriated and mismanaged and misused partnership assets and facilities.

John J. Curley, James Karanfilian and Duane Roberts, limited partners of Brignoli, Curley & Roberts Associates ("BCR"), a Delaware partnership, sue for removal of the corporate General Partner or alternatively dissolution of BCR, an accounting and damages arising from various breaches of fiduciary duty to BCR and its limited partners. They name as defendants (1) Brignoli & Curley, Inc. ("BCI"), the General Partner of BCR and a Delaware corporation; (2) BCR as a necessary defendant; and (3) Richard Brignoli, the principal shareholder and Chairman and President of Brignoli Models, Inc. ("BMI"), a limited partner of BCR; Brignoli is also Chief Executive Officer and President of BCI.

Jurisdiction of this Court is posited on diversity of citizenship and requisite amount in controversy.

The corporate General Partner, BCI, and defendant Brignoli, denied liability and asserted an assortment of affirmative defenses as well as counterclaims for damages in favor of the partnership against those limited partners who are plaintiffs herein, for their alleged fiduciary and contractual breaches as such limited partners. In addition, the General Partner, BCI, asserted on behalf of the partnership, so-called "counterclaims" against third-parties, for damages arising from alleged misperformance of contractual obligations of the latter to the partnership.

Jury and non-jury issues were thus posed and the third-party "counterclaims" were bifurcated and were tried to a jury. A verdict of no liability in favor of the counterclaim-defendants was returned by the jury. Final judgment was entered thereon.

Thereafter, the principal claims asserted in the compiaint as well as the defenses thereto, were tried at a Bench trial with the use of the record made before the jury. The counterclaims of the defendants against the plaintiffs were set apart to await a determination of whether there would be a dissolution of the partnership as demanded in the complaint and heard in the accounting among the partners to follow.

At the conclusion of the Bench trial, the Court finds as fact that inadequacy of legal remedies and irreparable harm have been adequately demonstrated and that it is not reasonable practicable or equitable to carry on the business in conformity with the BCR Partnership Agreement. See Del. Code tit. 6, § 17-803 (1985 Interim Supp.).

Briefly:

Richard Brignoli, who, late in 1987, assumed the title of Chief Executive Officer of the corporate General Partner, has been guilty of and has caused BCI to be guilty of such crass and autocratic conduct in the service of his selfish interest and in derogation of the interests of the limited partnership so as to affect prejudicially the carrying on of the business as a partnership. There are myriad facts and circumstances in evidence which warrant a Court of

equity to remove the General Partner and to install in its place a receiver until the limited partners of BCR can determine whether they wish to continue the business under a trusteeship or to dissolve the business and have an accounting as the equitable solution of the controversy herein.

The evidence adduced at trial amply established glaring misconduct by Brignoli and BCI. The limited partners were denied access to the partnership books and records and the assets of BCR were grossly misused by BCI and Richard Brignoli, including the misuse and pledge of a $175,000 certificate of deposit ("CD") owned by BCR as security for a bank loan to pay the bills of BMI, an entity controlled by Richard Brignoli of which he is Chairman and President and principal owner. BCI and Richard Brignoli have attempted to confuse and cloud the facts of their administration of the partnership with extravagant counter-charges and criticisms of the business practices of the limited partners-plaintiffs. These are merely part and parcel of the mistaken notion that Richard Brignoli was not accountable to anyone in his autarchical control of BCI and the affairs of the BCR partnership.

The incriminations and recriminations as between the partners cannot offset or cause us to overlook the abuse of the partnership assets and the bad faith of an excesses to which Richard Brignoli has gone to the detriment of the interest of the other partners.

For the reasons shown hereafter, an interlocutory judgment installing a receiver for BCR to conduct the

business pending a vote of the limited partners other than BMI whether to continue or dissolve the business, will be ordered herein. In the event dissolution is ordered thereafter, the counterclaims asserted by the present General Partner, BCI, in its pleading can then be considered to the extent appropriate in the accounting to follow. If no dissolution is to be ordered, a trustee can pursue such counterclaims as are not precluded by the judgment on the jury's verdict on the issues resolved in the jury trial.

I. The Background

A. The Parties

BCR is a Delaware limited partnership with its principal place of business at 15 West 39th Street in New York City. BCR was formed in 1984 in order to engage in the business of providing investment advisory and management services, investment and merchant banking and securities placements. (BCR Partnership Agreement, §1.4). There are thirteen limited partners.

The General Partner of BCR is BCI a Delaware corporation whose principal place of business also is in New York City. The shareholders of BCI are Richard Brignoli, as trustee, and John Curley. Brignoli owns 50.1% of BCI's stock and Curley owns 49.9%. Under Section 2(b) of the BCI Shareholders' Agreement, Brignoli serves as Chairman of the BCI board of directors which "shall at all times consist of a majority of directors designated by Brignoli."

Brignoli Models Inc. ("BMI"), is a 54% investor in the BCR limited partnership. BMI is owned by approximately ten stockholders of whom Richard Brignoli is the majority stockholder. BMI develops and markets computer programs for trading securities. BCR licensed the Excess Growth System Program from BMI for trading equity portfolios. As of September 2, 1987, BCR had successfully marketed Excess Growth under the leadership of John J. Curley as CEO to approximately twenty pension fund clients for whom BCR was managing over $1.2 billion in assets using Excess Growth.

B. Undisputed Matters

Curley acted as CEO and President of BCI, the General Partner, from October 1, 1984 to October 1, 1987, pursuant to a written employment agreement between himself and BCI. Curley managed the BCR partnership during that period and together with others he employed were largely responsible for the phenomenal growth of BCR during the next three years. BCI through Curley, hired Roberts on September 11, 1984 to serve as the director of marketing for BCR. Roberts also received an equity interest in BCR. From October, 1985 through January, 1988 BCR also through Curley, employed Karanfilian as an investment officer also with an equity interest in BCR. Curley, Roberts and Karanfilian collectively held approximately 36% of the equity of BCR.

From 1985 through the present, BMI was also a limited partner of BCR and held approximately 54% of its equity. Nine other limited partners hold the remaining

equity of BCR together with BCI which holds 1%. The value of each plaintiff's limited partnership interest exceeds $10,000.

On October 1, 1984 Curley on behalf of BCR entered into a licensing agreement with BMI to market a computer program designed by BMI. The computer program was called Excess Growth.

The Excess Growth system produced on a trade blotter a list of trades of securities which were to be accomplished on a daily basis. The consolidated trade blotter contained the name of the security, the number of shares to be bought or sold, and a "limit" price for the shares to be bought or sold for BCR's client portfolio.

It was not anticipated that all of the trades designated by the blotter would be completed each trading day.

Each night, the Excess Growth computer program automatically recalculated and adjusted the portfolios. The program recalculated the appropriate mix of securities to be held in the portfolio as it existed at the conclusion of the previous day's trades. Only those trades which were called for on the new daily blotter were to be executed.

Some time during the summer of 1985 Curley began using Richard Bennett to do the trades called for by the daily blotter. Curley had known Bennett for a number of years. On or about June 9, 1985 Bennett formed Brick Securities, Inc. ("Brick"). BCR hired Brick and Brick's

principal, Richard Bennett, to provide supervisory and trading functions for all of BCR's trading activities on behalf of BCR's clients. Brick was a licensed broker. Curley, Roberts, Karanfilian and Brignoli later became limited partners in Brick. Curley acted as the supervisor of the trades that Brick was performing for BCR.

C. **Disputes Among the Partners**

Beginning in or about June of 1987, disputes arose between Curley and Brignoli. Brignoli chose not to license BCR to market a new BMI program named Index Plus. Curley was keenly interested in obtaining those rights for BCR.

About the same time, Brignoli, after allegedly receiving complaints about Brick's performance, began to investigate Brick's trading in September 1987. According to Brignoli, further investigation in October of 1987 disclosed a "huge backlog" at BCR of transactions listed on the trade blotters that had not been executed. In November of 1987, Brignoli expressed his interest in having firms other than Brick execute the trades for BCR. Curley opposed this idea.

Meanwhile, the BCI Board of Directors held a meeting on November 23, 1987. Prior to the meeting, Curley stated that he could not attend a meeting until December 1. The BCI board had never before met when Curley was unable to attend.

At the November 23 meeting, the "board" of BCI -- Brignoli, Mr. Debe (Brignoli's uncle) and Mr. David (Brignoli's attorney) -- adopted resolutions that: (a) gave Brignoli control over what broker would execute commission trades for BCR clients; (b) allowed Lawrence Goldfein an attorney and business associate of one of the principals of Intervest, to be hired as an administrative consultant; and (c) appointed Brignoli to replace Curley as Chief Executive Officer of BCI.

Brignoli thereafter engaged BMI to produce "Stock Sleuth," a program designated to evaluate the effectiveness of a securities trader. He used Stock Sleuth purportedly to investigate the source of the BCR trading backlog. BMI billed BCR for huge costs for developing Stock Sleuth and conducting the related "investigation," without the approval of the limited partners or the BCI board of directors.

After the "investigation" was completed, Brignoli called a meeting with Curley, Bennett, Roberts and Karanfilian held in Brignoli's office December 11, 1987 purportedly for explanations. The charade over, later that day, Brignoli unilaterally dismissed Bennett and Brick as traders for BCR and he proceeded with what clearly was his plan all along. On the same day, December 11, 1987, Brignoli directed all BCR trading to be executed by Intervest, an entity in which Brignoli indirectly had a substantial interest. On December 18, 1987, the BCI board of directors at Brignoli's instigation, voted not to renew

Curley's contract of employment and to relieve him of all duties with respect to BCI and BCR.[1]

Karanfilian voluntarily left BCR in January, 1988. Roberts was fired in March 1988. Curley, Karanfilian and Roberts have since started a new money management firm, Cornerstone Asset Management, L.P., which they currently operate.

D. The Law Suit

This action was commenced on July 29, 1988. Plaintiffs claim defendants breached their fiduciary duties to BCR and its limited partners because (1) Brignoli, BCI and BCR refused them access to the books and records of BCR, (2) Brignoli used a BCR CD for $175,000 to secure a bank loan to BMI, from proceeds of which he paid BMI bills, (3) Brignoli authorized huge payments to BMI for "trading audit services" and "trading cost analysis" which were not necessary or for the benefit of BCR, and (4) Brignoli operated BCR in bad faith and in an autocratic

[1] At this time, the BCI board consisted of Brignoli, his uncle, his attorney (all BMI shareholders) and Curley. Curley cast the lone vote for renewal. Curley's employment contract with BCI had expired in October of 1987. He had continued his employment without a contract. This created a hiring at will after October 1987. Defendants, throughout the trial attempted to make much of this "non-renewal" characterization. Curley was then fired by Brignoli on December 18, 1987.

manner to benefit himself and his controlled companies at the expense of BCR. Plaintiffs seek removal of BCI as General Partner, or, alternatively, dissolution of BCR and an accounting. They further seek compensatory damages on their derivative claim brought on behalf of BCR against Richard Brignoli.

Defendants asserted six affirmative defenses: (1) lack of subject matter jurisdiction, (2) failure to first demand relief from BCR before bringing suit on plaintiffs' derivative claim, (3) lack of standing on the part of plaintiffs to sue on behalf of BCR, (4) failure to state claims upon which relief can be granted, (5) that the payments to BMI were necessary and reasonable, and (6) that plaintiffs have unclean hands.

In third-party claims (denominated by them as counterclaims) Brignoli on behalf of BCR and BCI claimed Brick and Bennett had caused a backlog in trading that, in turn, caused under-performance in the portfolios managed by BCR. A jury absolved Brick and Bennett of any liability on the issues raised by Brignoli in these third-party claims.

Using BCR as a claimant, BCI and BMI had mingled their third-party claims against Brick and Bennett with their counterclaims against the BCR limited partners. The counterclaims against the limited partners were set apart by the Court to be considered at a later date. Those counterclaims associated the plaintiffs-limited partners with Brick and Bennett's alleged malperformance and

misconduct, and demanded damages from the limited partners on behalf of BCR.

The counterclaims referred to above ar as follows:

1st Claim (against Brick Associates): Breach of Contract with BCR. Relief Sought: $20 million damages.

2nd Claim (against Brick Associates, Bennett, Curley, Karanfilian, and Roberts): Interference with Contract. Relief Sought: $30 million damages.

3rd Claim (against Brick Associates, Brick Partners, Bennett, Curley, Karanfilian, Roberts): Interference with Contract. Relief Sought: $30 million damages.

4th Claim (against Curley): Breach of Contract with BCI. Relief Sought: $30 million damages.

5th Claim (against Curley and Roberts): Defamation and Trade Disparagement. Relief Sought: $20 million damages.

6th Claim (against Bennett, Curley, Roberts, and Karanfilian): Negligence. Relief Sought: $20 million damages.

A jury trial was held from June 6 through June 12, 1989, which focused on the counterclaims against Brick

and Bennett although the plaintiffs were also charged therein. A Bench trial was held on the equitable issues from June 12, 1989 through July 10, 1989. Defendants had moved in advance of the trial for partial summary judgment, the motion being returnable at the commencement of the trial. The motion sought dismissal of plaintiffs' first claim for relief (removal of the General Partner or dissolution of the partnership), and an order directing plaintiffs to surrender their interests in BCR to defendants in return for payment. The court took no action on the motion other than to try the issues posed in the Bench trial.

II. Diversity Jurisdiction

Jurisdiction herein is posited on diversity of citizenship and the requisite amount in controversy. Defendants claim diversity was destroyed because plaintiff Roberts and defendant Brignoli are both citizens of Connecticut. The complaint had asserted that Brignoli was a citizen of New York. A decision of a Judge of this court had so found in another case.[2] Brignoli claimed a change of residence since that finding. If there was anything to Brignoli's assertion that he had moved from New York to Connecticut just before this suit, the diversity matter was completely cured when Roberts, a proper but unnecessary limited partner-plaintiff was dropped from the suit before plaintiffs rested plaintiffs' case. Fed. R. Civ. P. 21.

[2]Brignoli v. Balch, Hardy & Scheinman, Inc., 696 F.Supp. 37, 42 (S.D.N.Y. Oct. 4, 1988) (Sweet, J.).

III. The Claims for Equitable Intervention

The applicable legal principles and the claims of the plaintiffs which warrant equitable relief are as follows:

One standing in a fiduciary relation with another is liable to the other for harm resulting from a breach of fiduciary duty arising from the relationship. Restatement of Torts (Second) §874. "Although there is no set formulation of the fiduciary duties of partners, the main elements of the obligations owed by one partner to another have been defined as 'utmost good faith, fairness, loyalty.'" Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1078 (2d Cir. 1977) (quoting Crane and Bromberg, Law of Partnership, §68 at 390 (1968)), cert. denied, 434 U.S. 1035 (1978). See also, Boxer v. Huskey Oil Co., 429 A.2d 995, 997 (Del. Ch. 1981).

A partner is prohibited from self-dealing during the duration of the partnership and profits made through self-dealing belong to the partnership. In re Kohn's Estate, 26 Misc. 659, 116 N.Y.S.2d 167, 172 (1952), aff'd, 282 App.Div. 1045, 126 N.Y.S.2d 897 (1953). One partner may not wrongfully appropriate partnership property. Duncan v. Bruce, 43 N.Y.S.2d 447, 179 Misc. 992, 993 (N.Y. Sup. Ct. 1943).

A. Access to BCR's Books and Records

Plaintiffs claim BCI and Brignoli breached their fiduciary and statutory duties by failing to provide access to BCR's books and records. Defendants claimed that Arie

David, BCR's attorney, had arranged a meeting for an inspection. The defendants claimed that Jeffrey Zell, BCR's and BMI's accountant, was to meet with Robert Wishnew, CPA, the accountant for the plaintiffs and former accountant for BCR on June 6, 1988. The purpose of this meeting was to permit Wishnew, on behalf of the plaintiffs, to inspect BCR's books and records.

Wishnew testified no meeting was ever arranged by David or Zell. Further, Wishnew had not spoken to Zell regarding the meeting to Wishnew, his only communication with David on this matter was a June 23, 1988, telephone conversation made over two weeks after the June 6th meeting was to have taken place. In that conversation, David stated Wishnew would be denied access to the books and records of BCR unless Brignoli was given access to Brick's books.

Zell testified that he "believed" he had spoken with Wishnew about a meeting prior to June 6, 1988 via telephone, but he could not recall what was said or who initiated the call.

The Court finds that a meeting was never arranged and Wishnew was never provided with access to BCR's books and records. Zell never attempted to reschedule the meeting and never inquired as to why Wishnew did not come to the meeting.

The Court finds the meeting arrangements were a sham orchestrated by David. This was a thinly veiled attempt to disguise the defendants' refusal to provide

plaintiffs with access to BCR's books and records. Zell's testimony was evasive and not worthy of belief. Wishnew's evidence was thoroughly credible and believable.

All partners are entitled at all times to have access to and may inspect, partnership books and records. Del. Code tit. 6, § 17-305. BCI and Brignoli, breached their fiduciary and statutory duties to provide plaintiffs' access to BCR's books and records.

B. Pledge by Brignoli of the BCR Certificate of Deposit For a Loan to BMI.

Plaintiffs next claim Brignoli misappropriated BCR assets for his own benefit. Brignoli does not dispute that in 1988, he used a $175,000 certificate of deposit ("CD") owned by BCR to secure a bank loan for BMI without prior knowledge or authorization of the BCI board of directors. Brignoli did not tell the bank officer of the purpose of the loan. Brignoli contends, however, (1) he was generally authorized to take such action under the Partnership Agreement[3] as the representative of the General Partner, BCI, and (2) that the purpose of the pledge and bank loan was to secure payment for

[3] Article 4.1(f) provides "the General Partner, in his sole and absolute discretion, shall have the full right, power and authority from time to time, and any time on behalf of the Partnership . . .[t]o execute and deliver promissory notes, guarantees, agreements and other instruments."

"investigation" services that BMI rendered or was to furnish to BCR.

Neither alibi justifies Brignoli's clear breach of his fiduciary duties by misappropriating BCR's assets. Even assuming, arguendo, that the Partnership Agreement authorized Brignoli to pledge BCR's assets in general for bank loans, it seems ludicrous to postulate he was authorized to do so to BCR's detriment and to the benefit of himself and an entity in which he was personally interested and controlled; neither was "on behalf of the Partnership" as required by the Partnership Agreement.

Brignoli admitted on cross-examination that he obtained the $175,000 loan and the proceeds were used by BMI to pay BMI bills. The loan and security agreements were entered into after BMI had advanced $122,000 to an "unknown entity" at One Exchange Plaza, New York, NY -- the same business address of Intervest, the entity chosen by Brignoli to execute BCR's trades after the dismissal of Brick. Although Brignoli claims the loan was not made to Intervest, Intervest is repaying the loan. The balance of the loan has never been repaid to the bank which continues to hold the CD as security. Brignoli's testimony was a patent attempted cover-up for a fraudulent act on his part.

The Court finds the Partnership Agreement did not authorize Brignoli to pledge the BCR CD. The pledge was in fact a misappropriation of the partnership's assets for the benefit of BMI. Such conduct constituted a breach of fiduciary duty owed by Brignoli and BCI to BCR, and

Brignoli is liable to BCR for the amount required to repay the bank and release the CD to BCR.

C. Payments to BMI for "Trading Audit Services and "Trading Cost Analysis.

After Brignoli terminated Curley, Bennett and Brick in December, 1987, he engaged BMI to conduct several trading performance studies to "investigate" Brick's effectiveness in executing the trades called for by the BMI computer system. The fees BMI charged BCR for these alleged studies totaled approximately $500,000 or more which included $250,000 for the development of "Stock Sleuth," a computer program that was designated to measure the performance of stock traders by, inter alia, a comparing of the trades requested on the trading blotter versus the number of trades executed. However, Brick did trading for at least three other BMI licensees and BMI did not charge them for these services. Brignoli distinguished those cases by stating BCR was the only licensee he was responsible for and that BCR was also the money manager on the pension accounts.

Prior to December 1987, BMI had never been hired by anyone or shown any proficiency to do trading audit services. Brignoli hired BMI to render trading audit services disdaining to obtain a price quote from Abel Noser, SEI or any other qualified firm which regularly provides such services. Brignoli stated he did not obtain a cost estimate because these other firms could not adapt their software to Brignoli's specifications. Yet, two experts, including one called by the defendants, testified

Stock Sleuth could be recreated fairly easily and inexpensively. The experts' price quotes ranged from $74,000 to $80,000[4]. Brignoli in effect caused BCR to be charged by his controlled company, BMI, a total of $250,000 for the caper.

The hiring of BMI to render trading audit services was not formally presented to the BCI board of directors and it was not discussed with Curley. BMI carried out the services and billed BCR for the time spent on the project using a salary multiplier in excess of three times the salaries of BMI employees utilized in providing the services.

Brignoli justified the billing rates by stating Curley had approved the use of a salary multiplier in another circumstance when he approved the payment of certain production fees paid to BMI by BCR. Because the initial production cost agreement reached between Curley and BMI was not brought to the BCI board of directors for

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[4]These estimates did not include the expense of formulating the parameters for the study. However, the fact that Brignoli hired BMI without obtaining BCI's approval or outside estimates constitutes a breach of fiduciary duty. Such self-dealing is prohibited if not fully disclosed and authorized, regardless of whether it may be "fair" to the partnership. See A. Bromberg and L. Ribstein, Bromberg and Ribstein on Partnership, § 6.07(b) (1988) ("If there is no informed consent, the mere fact that the transaction is fair to the partnership may be insufficient to validate it.").

approval, Brignoli said he did not feel he was required to present the extraordinary and unusual "trading audit services" and "trading cost analysis" employment to the BCI board. Curley, however, was not financially connected to BMI, and independently approved the amount of fees, the scope of the services, and the provider of the services, all in the usual course of business as an ordinary current incidental expense.

D. Other Claims of Self-Dealing

Plaintiffs further claim Brignoli breached his fiduciary duty by (1) diverting BCR's trading operations to Intervest, an untried entity in which he has a substantial interest, (2) using BCR marketing staff to promote BMI products other than Excess Growth, and (3) placing BMI consultants and employees on the BCR payroll.

1. Intervest

In October of 1987, Brignoli unilaterally decided to transfer some of Brick's trading duties to an entity called Intervest. Brignoli maintained that he had no financial interest in Intervest. However, in October of 1987, he began contemplating a business combination that would have resulted in BMI having a 25% ownership interest in both Intervest and a firm referred to as "Delta." One of Intervest's principals, Jeff King, was one of the principals of Delta.

Brignoli was still contemplating their arrangement when he fired Curley and Brick and later hired Intervest.

Brignoli also personally loaned $500,000 to King for Delta's use, caused BMI to make a loan of $122,000 that Intervest was repaying, and caused BMI to secure a lease on office space that it sublet to Intervest and Delta.

Brignoli's financial interest, albeit a non-equity one, in Intervest and other related entities was substantial. Testimony at trial thus indicated Brignoli abused his position with BCR by replacing Brick with Intervest as part of a larger plan to "freeze out" the plaintiffs from a business they started, built from scratch and from which they had only begun to receive substantial benefit. Such a motivation stamps the actions of Brignoli and BCI as evidence of conduct in bad faith.

2. Marketing of BMI Products Using BCR Personnel

Testimony showed that in June of 1987, Brignoli asked Roberts, then head of marketing at BCR, to assist him in setting up the marketing effort for Volatility Capture System, a program similar to Excess Growth which was developed and marketed by Brignoli Advisors, another Brignoli-affiliated money management vehicle. Roberts refused, asserting that no benefit from this new program would accrue to BCR. In February of 1988, Brignoli told Roberts to "coordinate" his marketing efforts with Bill Morris, the marketing director at Brignoli Advisors. Again, Roberts refused. Roberts was fired the next month.

Bruce Kerr, Robert's replacement at BCR, was originally hired to market Volatility Capture for Brignoli

Advisors. Kerr stated that when he makes marketing calls on behalf of BCR, he "pitches" both Volatility Capture and Excess Growth to prospective clients, although Excess Growth is the "main thrust" of the presentation.

Annette Borenstein, a BCR marketing associate, was also originally hired by Brignoli Advisors. After Roberts was fired by Brignoli, Borenstein was transferred to the BCR payroll. At BCR she continued to complete investment advisor questionnaires for BMI.

It appears from the trial testimony that Brignoli's desire to successfully market Volatility Capture led him to misappropriate BCR's marketing resources for the benefit of his other company, Brignoli Advisors. Roberts had successfully marketed Excess Growth and Brignoli knew Roberts' assistance could lead to success for Volatility Capture. When Roberts refused, Brignoli demanded "coordination" of efforts to avoid embarrassment and confusion with prospective clients. However, this coordination included the sharing of the names of prospective clients and Roberts' plans for selling Excess Growth to them.

When Roberts refused to "play along" with Brignoli's game, he was fired and Brignoli assumed control of marketing for both products with all the attendant conflicts of interest. Again, the formerly active limited partners of BCR were the victims of a "freeze out," in this instance, designed to wrongfully exploit BCR's marketing system -- another instance of bad faith attributable to Brignoli and BCI through him.

3. BMI Staff on the BCR Payroll

The plaintiffs alleged and proved that after Brignoli successfully completed the "freeze out," BCR became a haven equipped with machinery to turn out benefits for himself, friends, family, BMI employees and shareholders.

After Brignoli fired Curley, Brignoli cause BCR to pay huge amounts to BMI for additional production services not covered in the BCR/BMI licensing agreement. Curley had previously negotiated for production payments of approximately $26,000 per month. Once Curley left BCR, BMI retroactively increased the costs billed to approximately $82,000 per month. No one at BCR negotiated the terms of the additional production fees; they were unilaterally set in place by Brignoli and BMI.

Brignoli also caused BCR to hire BMI employees at inflated rates to perform routine back office work for BCR. When two key back office staff members of BCR left in June of 1988, Brignoli "discovered a mess" in the BCR back office dating back six to nine months. Brignoli placed the blame for this "mess" on Curley even though Brignoli had been in charge of BCR for six months. Rather than simply hiring permanent BCR clerical staff to replace the departed BCR employees, Brignoli replaced them with BMI personnel and billed BCR for their services using a salary multiplier in excess of three times their actual BMI salaries. Brignoli testified the BCR back office now runs more efficiently and that the current average monthly BCR back office costs are comparable to the average monthly back office costs under Curley's tenure. However, BCR

now has only approximately $500,000 under management whereas under Curley, BCR has managed in excess of $1.2 billion.

At the same time, Brignoli increased his own wages paid by BCR. In 1988, Brignoli placed himself on the BCR payroll at a salary of $250,000 per year while still receiving a $175,000 salary for a second full-time position at BMI. Curley's contract only called for a salary of $150,000 per year from BCR. Brignoli testified he himself directed the amount of his salary as compensation for the work he performed in Curley's place after Curley was fired.

The trial testimony, however, showed that in 1988 Brignoli visited only one potential client of BCR and met with prospective clients in BCR's offices on two or three occasions. Testimony also showed he was largely ignorant of the day-to-day operations which Curley had formerly supervised. He remained unaware of BCR's billing practices and general financial affairs. Moreover, Curley previously received only $150,000 per year from BCR for actively overseeing BCR's operations and Curley did not hold a second full-time position at the same time.

Brignoli further directed BCR to pay a whole host of BMI employees and consultants for work performed for BMI, if at all. He had BCR pay a $50,000 advance retainer to Arie David, a BMI shareholder and outside counsel to BMI and attorney for Richard Brignoli, to be applied to future billings. No hourly accounting to support billings was supplied to BCR or submitted on this record

by David. BCR paid David the retainer and David's firm in addition charged BCR over $25,000 for work on a summary judgment motion that was never filed at that time; the "retainer" was never applied to those billings.

Joseph Debe, Brignoli's uncle, provided consulting services to BMI and had received approximately $50,000 per year for such services. In 1988, Brignoli placed Debe on the BCR payroll without Debe's knowledge at a salary of $100,000 per year. After the transfer, the services Debe provided were not altered. Debe testified he asked to be removed from the BCR payroll when he learned of the transfer, in part because he "didn't want or need" to be put on the payroll.

Brignoli also hired his "old sailing buddy" Robin Cotterell to do accounting work at BCR for $75,000 per year. Brignoli justified Cotterell's employment by stating Cotterell automated BCR's financial reporting system. Brignoli also testified, however, he had to fire Cotterell when he later discovered that Cotterell had charged large amounts of unauthorized personal expenses to BMI.

Robert Ince had been a consultant to both BCR and BMI. Prior to 1988, Ince had billed each entity separately for the services he rendered. After Brignoli assumed control of BCR, Ince testified that Brignoli directed him to bill BCR for all services rendered without regard to which entity received the benefit of his work.

Curley had refused to pay consulting fees to Professor Harry Markowitz. When Brignoli assumed

control of BCR, he approved payment of $3,000 per month in consulting fees to Markowitz.

When viewed in concert these acts provide mounting evidence of the degree of abuse and self-dealing in conducting BCR's affairs that Brignoli imparted during his tenure at BCI. This limited partnership whose continued existence depended on the good faith and fair dealing of the General Partner, has furnished the Court every reason for terminating the General Partner's tenure.

IV. Affirmative Defenses

Defendants defend their conduct by counter-accusations that plaintiffs have come before the Court with purportedly unclean hands. They assert plaintiffs have committed numerous securities, ERISA, and other statutory violations and breached their fiduciary duties to the clients of BCR primarily by engaging in cross-trading,[5], by failing to inform BCR's clients and the government of such cross-trading, by failing to keep proper records and falsifying other statutorily-required records pertaining to their cross-trading, by trading for personal accounts on inside information of what the clients were buying and selling, and by forming Cornerstone to compete with BCR for the provision of money management services.

[5]Cross-trading is where one broker represents both the buyer and the seller of a security and executes both the purchase and the sell side of the transaction, and receives a commission for both.

In so arguing, the defendants misinterpret the thrust of the clean hands doctrine:

> The rule is that unrelated bad conduct is not to be considered against the plaintiff. It is only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claims, that he is to be barred because of his conduct. "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts.***"

D. Dobbs, Remedies § 2.4 at 46 (1973) (quoting Republic Molding Corporation v. B.W. Photo Utilities, 319 F.2d 347 (9th Cir. 1963)).

Defendants have failed to demonstrate that plaintiffs' actions were somehow "the source of" defendants' clear violations of their fiduciary duties.[6] Plaintiffs acquired their rights against the defendants not

[6]Brignoli contended at trial that his pledge of BCR's certificate of deposit for a bank loan to BMI and BMI's performance of the trading investigation services were "caused" by the trading improprieties committed by Brick and Bennett in concert with the plaintiffs. However, Brignoli failed to obtain approval and a resolution of BCI's board before so acting. And the idea that plaintiffs somehow "caused" Brignoli to pledge BCR's certificate of deposit is ludicrous, especially given Brignoli's testimony that BMI's counsel, Arie David, had advised him not to do it.

through any misconduct on their own part, but by their mere status as limited partners of an entity which defendants have mistreated an abused. Moreover, the Partnership Agreement specifically provides that limited partners may engage in competing activities.[7]

Defendants next argue plaintiffs lack standing to bring suit "on behalf of" BCR, and have failed to fulfill the statutory requirements for bringing their derivative claim by failing to first demand relief from BCR.

A limited partner may bring an action on behalf of the partnership to recover a judgment in its favor if the general partners with authority to so have refused or if an effort to cause those general partners to bring the action would not likely succeed. De. Code tit. 6, § 17-1001.

[7]Section 4.4 of the Partnership Agreement provides:

> "[N]either this Agreement nor any activity undertaken on behalf of the Partnership shall prevent the Limited Partners from engaging in any other activities or businesses or from making investments, whether or not such activities, businesses or investments are similar in nature to the business of the Partnership, whether individually or jointly with others, without any obligation to account to the other Partners for any profits or other benefits derived therefrom, and without having to offer an interest in such activities, businesses or investments to the other Partners.

The complaint must set forth with particularity the effort of the plaintiff to secure initiation of the action or the reasons for not making an effort. Id § 17-1003.

Paragraph 16 of plaintiffs' complaint states:

> Given the refusal by BCI to comply with the statutory obligation to provide access to the partnership's books and records...as well as other refusals to provide information, a demand upon BCI to redress the breaches of fiduciary duty complained of herein would be futile.

Plaintiffs have clearly set forth why an effort to cause BCI to bring such an action would not likely succeed. They have also included in the complaint their reasons for not making such an effort. Therefore, the statutory requirements for bringing the derivative claim have been met.

Moreover, the statute by its terms does not indicate the plaintiffs must somehow show their moral worthiness to bring suit in their derivative capacity. Defendants, without citing authority for the proposition, argue plaintiffs may not bring suit on behalf of BCR in light of their participation in Cornerstone, a money management enterprise which allegedly competes with BCR. Such activity is neither prohibited by the Partnership Agreement nor by statute. Plaintiffs have fulfilled the statutory requirements for bringing a derivative suit against Brignoli

for misappropriation of assets and damages, and they may do so.

Defendants next contend the BCR Partnership Agreement exempts their good faith conduct from liability unless the conduct constitutes "gross negligence, willful misconduct or recklessness." This Agreement simply misreads the terms of the Partnership Agreement, which provides:

> 4.3 Indemnification of General Partner. The General Partner shall not be liable to the Partnership or to any Limited Partner for any act or omission in good faith and within the scope of the authority conferred by this Agreement. The Partnership shall indemnify and save harmless the General Partner from and against any and all liability, loss, cost, expense or damage incurred or sustained in the conduct of the business of the Partnership within the scope of the authority conferred by this Agreement; provided, however, that the General Partner shall not be entitled to any indemnification in the event any such liability, loss, costs, expense or damage is incurred or sustained as a result of the General Partner's gross negligence, willful misconduct or recklessness.

By its terms the Agreement provides that BCR will indemnify BCI unless BCI acts willfully or recklessly; it does not provide that the limited partners may not successfully recover damages directly from BCI or Brignoli for misconduct which was merely negligent. The

Agreement only exempts conduct performed "in good faith" and "within the scope of the authority" of the Partnership Agreement. Since defendants' conduct was neither performed in good faith nor within the scope of the authority conferred by the Agreement, see discussion infra, the plaintiff limited partners may properly bring suit against them.

Defendants remaining affirmative defense -- that the payments to BMI were necessary and reasonable -- and the Second, Third and Sixth Counterclaims against plaintiffs and Roberts are precluded by virtue of the jury verdict rendered in favor of Brick and Bennett on the claims which overlap those now asserted against plaintiffs and Roberts.

The counterclaim complaint based the overlapping claims primarily on allegations that Brick failed to execute the "vast majority" of trading requests on the trading blotter, and that Curley and Bennett failed to properly supervise Brick's trading. The pre-trial order submitted and signed by defendants' counsel on the jury claims further stated Bennett, Brick, Curley, Roberts and Karanfilian "acted in concert" to breach their fiduciary duties to BCR, and that Bennett and Brick's failure to trade the requested securities and their alleged use of knowledge of the merchandise which BCR's client were trading were done "with the understanding and knowledge of Curley, Karanfilian, and Roberts." The counterclaim plaintiffs presented evidence, and the jury was instructed, on each of these allegations. The jury returned a verdict in favor of Brick and Bennett.

The defendants are bound by the jury's resolution of the counterclaims against Brick and Bennett which are also material to the equitable claims asserted by plaintiffs. Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 508 (1959). And to the extent the counterclaims were resolved against BCI and Brignoli, the judgment thereon may be used under the doctrines of res judicata or collateral estoppel to preclude the additional counterclaims BCI and Brignoli have asserted against plaintiffs and Roberts for their alleged misconduct while acting in conjunction with Brick and Bennett. N.L.R.B. v. United Technologies Corp., 706 F.2d 1254, 1259, 1260 (2d Cir. 1983) (Kearse, J.). This effectively disposes of defendants' "necessary and reasonable" defense as well as the Second, Third, and Sixth counterclaims lodged against plaintiffs and third-party defendant Roberts. The remaining counterclaims -- for breach of contract against Curley and defamation and trade disparagement against Curley and Roberts -- may be tried in connection with a partnership accounting. See Mack v. White, 35 Del. 289, 165 A. 150 (Del. Sup. Ct. 1933).

5. Relief Granted

The Delaware Revised Uniform Limited Partnership Act provides:

> On application by or for a partner the Court...may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Del. Code tit. 6, §17-803.

The Delaware Uniform Partnership Act further provides that the Court may order a dissolution as provided by statute when, inter alia, (1) a partner "has been guilty of such conduct as tends to affect prejudicially the carrying on the business", (2) a partner "so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him", or (3) "other circumstances may render a dissolution equitable". Del. Code tit. 6, §17-1532.

These "other circumstances" include such infractions as breach of fiduciary duty, May v. Flowers, 483 N.Y.S.2d 551, 106 A.D.2d 873 (N.Y. App. Div.), appeal dismissed, 64 N.Y.2d 611, 491 N.Y.S.2d 1025, 480 N.E.2d 749 (1985), misappropriation of assets, Duncan v. Bruce, 43 N.Y.S.2d 447, 179 Misc. 992, 993 (N.Y. Sup. Ct. 1943), and refusal to permit the inspection of the books, records or documents. Susman v. Venture, 70 Ill. Dec. 269, 449 N.E.2d 143, 148, 114 Ill. App.3d 668 (1982).

The extreme level of gross misconduct and arbitrary management of BCI's affairs willfully committed by Brignoli in his capacity as majority shareholder of BCI indicates it is not reasonably practicable to carry on the business of BCR with BCI remaining as the General Partner. The Court concludes BCI's presence as General Partner poses a serious and immediate threat of further

misappropriation of BCR funds and of further ultra vires acts.

Defendants, however, have strenuously argued against immediate dissolution of the partnership as a going concern. Under its inherent equitable powers the Court concludes BCI is legally incapable of performing its statutory duties as the General Partner of BCR fairly and in good faith, and therefore grants Plaintiffs' more limited request for removal of BCI as the General Partner, and will appoint an interim receiver until such reasonable time as a majority of the limited partners exclusive of BMI vote to continue the partnership and appoint one or more new General Partners as successor to BCI. See J. Crane, Handbook on the Law of Partnership (1952) p. 418 ("In a business trust [defined as analogous to a limited partnership], fraudulent or other seriously improper conduct on the part of the trustees [general partners] may be a sufficient reason for their removal by a court of equity, but it is not necessary that the trust be wound up." *May v. Flowers, supra* at 553 (action of general partner and limited partner in assigning equipment lease to the partnership in return for partnership's assumption of lease obligations made by the general and limited partner to the other limited partner was breach of fiduciary duty warranting expulsion of general partner and limited partner from partnership, dissolution of partnership, and rescission of assignment).[8]

[8] Upon removal of BCI as the General Partner of BCR, the BCI Shareholders Agreement will also be terminated automatically under Section 5(b) of that agreement.

The vote of the limited partners shall be carried out according to the terms of the Partnership Agreement, which provides:

> If the General Partner [BCI] shall withdraw or retire after August, 1987 . . . then the General Partner or its legal representative shall promptly notify the Limited Partners thereof and shall dissolve the Partnership, unless a majority in interest of the Limited Partners, exclusive of Brignoli Models, Inc., shall desire to continue the Partnership and appoint one or more new general partners as successor to the General Partner.

Article VI, Section 6.1(b).

If the limited partners decide to continue the Partnership, they shall appoint a new General Partner as further provided by Section 6.1(b) of the Partnership Agreement. If they do not so vote to continue the Partnership, it shall be dissolved, an accounting shall be had, and its affairs wound up pursuant to Sections 17-801 and 17-802 of title 6 of the Delaware Revised Uniform

Limited Partnership Act and sections 7.1 through 7.4, inclusive, of the Partnership Agreement.[9]

BMI will be enjoined from voting its interest in BCR for the selection of a successor General Partner if the limited partners vote to continue the Partnership, or for the

[9] Section 17-802 provides:

> On application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Delaware Code, tit. 6, §17-802 (1985 Interim Supp.).

Section 17-801 further provides that upon entry of a decree of judicial dissolution under §17-802 or upon withdrawal of a general partner, "[a] limited partnership is dissolved and its affairs shall be wound up." Id. §17-801.

selection of a liquidating trustee if the limited partners vote to dissolve the partnership under section 7.2 of the Partnership Agreement.[10] In the event of default of the limited partners' in selection of a liquidating trustee upon a vote for dissolution of the partnership, the Court will appoint a liquidating trustee to wind up the partnership affairs.

[10] Section 7.2 of the Agreement provides in relevant part:

> Liquidating Trustee. Upon dissolution of the Partnership, the liquidating trustee (which shall be the General Partners, unless all general partners are the subject of one of the events set forth in subsection (a) of Section 7.1 [including legal incapacity or withdrawal of the General Partner], in which case a person selected by a majority in interest of the Limited Partners shall be the liquidating trustee) shall proceed diligently to wind up the affairs of the Partnership and distribute its assets to the Partners in accordance with their respective capital accounts.

The Court further awards, on plaintiffs' derivative claim for relief, damages to BCR, the nominal party-defendant, against defendant Richard Brignoli in the amount of $175,000 or such amount as is necessary to be paid to Republic National Bank of New York to release the converted CD belonging to BCR.

The "counterclaims" against plaintiffs and Roberts which are not precluded by the judgment on the jury's verdict may be pursued either by the new BCR General Partner or the liquidating trustee within the context of a proceeding for an accounting.

Accordingly, an interlocutory judgment providing for relief set forth above shall be entered herein. A proposed form of such judgment shall be submitted on or before August 16, 1989, on five days' notice.

The foregoing shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated: August 4, 1989 Milton Pollack
Senior United States District Judge

Judgment of the United States District Court for the Southern District of New York, dated August 28, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiffs, 88 Civ. 5307 (MP)

– against – JUDGMENT

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC. and RICHARD BRIGNOLI,

Defendants.

A non-jury trial was held before the Honorable Milton Pollcack on June 12, 27, 28 and 29 and July 10, 1989. Thereafter, the Court handed down its opinion dated August 4, 1989, directing entry of an interlocutory judgment on plaintiffs' claims. In accordance with the terms of said opinion, it is

ORDERED, ADJUDGED and DECREED that:

1. Richard Brignoli shall immediately restore to Brignoli, Curley & Roberts Associates ("BCR") free and clear of any liens, claims or encumbrances, a Certificate of Deposit in the amount of $175,000 plus accrued interest which BCR has at Republic National Bank of New York. If Richard Brignoli fails to do so within three days of the entry of this judgment, then judgment shall be entered in favor of BCR against Richard Brignoli in such amount as is necessary to be paid to Republic National Bank of New York to release the Certificate of Deposit belonging to BCR.

2. BCR shall be dissolved. To the extent BCR has retained any clients, such clients are to be advised that BCR will cease operations as of September 30, 1989.

3. The law firm of Battle Fowler, 280 Park Avenue, New York, New York by Gerald J. Fields, Esq., a member of the firm, shall be appointed as receiver and liquidating trustee for BCR. The Receiver and Liquidating Trustee shall have the power:

a) to retain an accounting firm to prepare schedules showing as of the date of entry of this judgment (i) all receipts of funds by BCR from December 1, 1987 and the source of each such receipt; (ii) each disbursement of funds by BCR from December 1, 1987, or such earlier date as the accountants may establish for the disbursements of BCR funds, to be grouped by recipient showing the recipient and the purpose of the disbursement; (iii) all outstanding payables or BCR; (iv) any contingent liabilities of BCR; and (v) the assets, including receivables, of BCR.

b) to determine whether any claims should be prosecuted, or continue to be prosecuted, by BCR including, but not limited to, (i) claims against any partner of BCR or person controlling any partner and (ii) claims against Richard Bennett, Brick Securities LP or Brick Securities Associates. Nothing contained in this Judgment, however, precludes any individual or entity other than BCR from prosecuting at their own expense any claim that they may have.

c) to take any action which could have been taken by general partner of BCR.

4. The Receiver and Liquidating Trustee, and the accounting firm retained by it, shall have their fees paid, subject to the approval of the Court, from the assets of BCR before any payments are made from those assets to either the creditors or partners of BCR.

5. Richard Brignoli, Brignoli & Curley, Inc. and BCR are each ordered to produce all books, records and files pertaining to the business of BCR at the offices of BCR on the third floor of 15 West 39th Street, New York, New York and deliver possession of such documents, books and records to the Receiver and Liquidating Trustee.

6. The Receiver and Liquidating Trustee shall:

a) immediately take into its custody; control and possession all assets and property of BCR;

b) conserve and liquidate all assets and property of BCR in a manner which the Receiver and Liquidating Trustee finds, in its sole discretion, to be the most advantageous to the estate, and to invest such resulting funds in interest bearing accounts at any bank located in the County of New York organized under the laws of the United States of America, or any state thereof, having a combined capital and surplus of not less than $50,000,000, whose deposits are insured by the Federal Deposit Insurance Corporation; and

c) hold such funds pending final determination of their disposition as may be further ordered by this court.

7. On or before October 10, 1989, or such later date as the Court may establish, the Receiver and Liquidating Trustee shall:

a) convert all property of BCR to cash; and

b) file with the Court a report stating (i) the cash held in the accounts of BCR and any realizable receivables of BCR; (ii) any accounts payable by BCR; (iii) the recommended disposition of any claims previously asserted by BCR; (iv) a recommendation as to whether BCR should assert claims against any person or entity for injury caused to BCR as a result of the acts of said person or entity; (v) a recommendation of whether plaintiffs in this action should have the legal fees incurred in connection with this action reimbursed from the funds, if any,

recovered by BCR from the persons responsible for the breaches of fiduciary duty set forth in the August 4 opinion of the Court and, if such reimbursement is recommended, the amount recommended to be reimbursed.

8. The Receiver and Liquidating Trustee may pursue, within the context of the proceeding for an accounting, any counterclaims asserted in this action against John Curley, James Karanfilian or Duane Roberts to the extent such counterclaims are not precluded by this Judgment or by the judgment on the jury verdict rendered in connection with the claims BCR asserted against Brick Securities and Richard Bennett in an earlier phase of this action.

9. Within two days of the entry of this Judgment, the Receiver and Liquidating Trustee shall send a copy thereof by Certified Mail/Return Receipt Requested to each of the remaining clients of BCR.

Dated: New York New York
August 28, 1989

/s/ Milton Pollack, SR. U.S.D.J.

Clerk of the Court

Amended Judgment of the United States District Court for the Southern District of New York, dated July 24, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIGNOLI CURLEY & ROBERTS, ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC. and BRIGNOLI MODELS, INC.,
Counterclaim Plaintiffs,

– against –

BRICK SECURITIES ASSOCIATES and BRICK SECURITIES PARTNERS, L.P., and RICHARD BENNETT,
Counterclaim Defendants.

88 CIVIL 5307 (MP)

AMENDED

JUDGMENT

A bifurcated jury trial before the Honorable MILTON POLLACK, U.S.D.J., having begun on June 6, 1989, on the issues set forth in the counterclaims, and at the conclusion of the trial the jury having returned a verdict in favor of the counterclaim defendants as against the counterclaim plaintiffs, and the Court thereafter on July 24, 1989, having handed down its Rule 54(b) Certificate, directing the Clerk to enter final judgment in favor of Brick Securities Associates, Brick Securities Partners, L.P., and Richard Bennett, and against Brignoli Curley & Roberts, Associates, Brignoli & Curley, Inc., and Brignoli Models, Inc., with costs to be taxed by the Clerk, it is,

ORDERED, ADJUDGED AND DECREED: That the counterclaim defendants Brick Securities Associates, Brick Securities Partners, L.P., and Richard Bennett have judgment against counterclaim plaintiffs Brignoli Curley & Roberts, Associates, Brignoli & Curley, Inc., and Brignoli Models, Inc., dismissing the counterclaims, with costs to be taxed, and it is further,

ORDERED, That the judgment entered June 15, 1989, be and it is hereby vacated.

DATED: NEW YORK, NEW YORK
July 24, 1989

APPROVED:
/s/ Milton Pollack,
U.S.D.J.

/s/ Raymond F. Burghardt,
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiffs, 88 Civ. 5307 (MP)

– against – ORDER

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC. and RICHARD BRIGNOLI,

Defendants.

The Court having received the Report of the Receiver and Liquidating Trustee for Brignoli Curley & Roberts Associates ("BCR") dated October 31, 1989, and having received the Response And Objections By Brignoli and Curley Inc. and Richard Brignoli to the Receiver's Report, and having held a hearing on November 15, 1989, and due deliberation having been had thereon, it is hereby

ORDERED that Recommendation No. 1 as set forth in Part II of the Receiver's Report (Section II, page 4) for salary paid

by BCR is approved and the Receiver is authorized to pursue this claim against Richard Brignoli; and it is further

ORDERED that Recommendations No. 2 and No. 8 as set forth in Part II of the Receiver's Report (Section II, pages 5, 15) for legal fees paid by BCR is approved and the Receiver is authorized to pursue this claim against Richard Brignoli and Arie David; and it is further

ORDERED that Recommendation No. 3 as set forth in Part II of the Receiver's Report (Section III, page 8) for charges paid to Brignoli Models Inc. for the development of "Stock Sleuth" is approved and the Receiver is authorized to pursue this claim against Richard Brignoli and Brignoli Models Inc.; and it is further

ORDERED that the Recommendations Nos. 4, 5, 6 and 7 to pursue certain claims against Richard Brignoli and Brignoli Models Inc., as set forth in Part II of the Receiver's Report (Section II, pages 9-14), are disapproved without prejudice; and it is further

ORDERED that the Receiver's recommendation as to recovery of legal fees of plaintiffs' counsel herein, as set forth in Part II of the Receiver's Report (Section III, page 16), is deferred until the final accounting is made herein.

Dated: New York New York
November 27, 1989

/s/ Milton Pollack
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiffs, 88 Civ. 5307 (MP)

– against – ORDER

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC. and RICHARD BRIGNOLI,

Defendants.

The United States Court of Appeals for the Second Circuit having affirmed the judgments of this Court dated August 28, 1989 and November 13, 1989 and having remanded this action to this Court for further proceedings consistent with the opinion and judgment of the Court of Appeals dated Semtember 20, 1990, it is hereby

ORDERED that this action be recharacterized as a class action under Fed.R.Civ.P. 23.2 with plaintiffs John J. Curley and James Karanfilian representing the class of all limited partners of Brignoli Curley & Roberts Associates ("BCR") except Brignoli Models, Inc. and it is further

ORDERED that BCR be dismissed from this action as a dispensable party and it is further

ORDERED that the caption of this proceeding be amended to read as follows:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. CURLEY, JAMES KARANFILIAN
on behalf of themselves and all
other limited partners of BRIGNOLI,
CURLEY & ROBERTS ASSOCIATES,
except BRIGNOLI MODELS, INC.,
Plaintiffs,

– against –

BRIGNOLI & CURLEY INC.
and RICHARD BRIGNOLI,
Defendants.

Dated: New York New York
December 12, 1990

/s/ Milton Pollack
U.S.D.J.

ORDER OF UNITED STATES COURT OF APPEALS DENYING PETITION FOR RE-HEARING IN BANC DATED NOVEMBER 6, 1990

United States Court of Appeals
for the Second Circuit

/STAMP/
United States Court of Appeals, Second Circuit
Filed November 6, 1990
Elaine B. Goldsmith, Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of November, one thousand nine hundred and ninety-one.

DOCKET NUMBER 89-7979

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JOHN J. CURLEY, JAMES KARANFILIAN and :
DUANE ROBERTS, individually and on behalf of :
BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a :
Delaware limited partnership,

Plaintiff-Appellees, :

:

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC., and RICHARD BRIGNOLI,

Defendants,

BRIGNOLI & CURLEY, INC. and RICHARD BRIGNOLI,

Defendants-Appellants,

BRIGNOLI MODELS, INC.,

Appellant.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, Brignoli & Curley Inc. and Richard Brignoli

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Letter from Senior Judge Milton Pollack to Counsel for the Parties, Setting Order of Trial, dated May 26, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, NEW YORK 10007

May 26, 1989

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Re: Curley, *et al.* v. Brignoli, Curley & Roberts Associates, *et al.*, 88 Civ. 5307 (MP)

Dear Counsel:

I have decided that we will empanel a jury and first try the counterclaims as against Brick. I am advised that the plaintiffs have consented to such an arrangement.

Accordingly, the counterclaim-plaintiffs should submit a set of marked pleadings, limited solely to their allegations and to the responses of the counterclaim-defendants, all with respect only to the counterclaims against Brick.

I intend thereafter to go forward with the claims of plaintiffs for a dissolution of the partnership and an accounting in connection therewith. This will be conducted non-jury.

I reserve for later consideration how the counterclaims of the defendants against the plaintiffs in respect of matters other than Brick will be heard if a dissolution of the partnership is granted.

The plaintiffs should furnish the Court with marked pleadings pertaining to the complaint and the defense thereto, omitting the allegations of the counterclaims and the responses of the counterclaim defendants.

Please let me have the requested marked pleadings as soon as possible.

Very truly yours,
/s/ Milton Pollack

Letter from Arie E. David to Honorable Milton Pollack, dated May 8, 1989

LAW OFFICES OF
ARIE E. DAVID
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BY HAND

Honorable Milton Pollack, U.S.D.J.
United States District Court
Southern District of New York
Room 2201
United States Courthouse
Foley Square
New York, New York 10007

Re: *Curley, et al. v. Brignoli, Curley & Roberts Associates, et al.*, 88 Civ. 5307 (MP)

Dear Judge Pollack:

I am submitting this letter to you pursuant to your request of April 21st, that defendants and counterclaimants submit a statement of authorities, supporting their contention that they are entitled to a jury trial. Our response is in two parts. The first part discusses plaintiffs' jury-trial rights on their claims. The second part discusses the right to jury trial on the counterclaims of defendants and counterclaimants. This response does not deal with the claims against third-party defendants, since the Court and counsel for all parties to said claims have agreed that a jury trial of those issues is proper. Accordingly, we have exchanged draft pre-trial orders with third-party defendants, as per Your Honor's orders.

I. PLAINTIFFS' CLAIMS

The essence of plaintiffs' claims is that defendants, which include the general partner of the limited partnership, have expended partnership funds unnecessarily, thus committing waste. The complaint alleges that the expenditures were improperly authorized without competitive bidding, and further alleges that they were designed to indirectly benefit defendant Richard J. Brignoli who is the controlling shareholder of the general partner.

Plaintiffs specifically plead for recovery of damages, which is *the* classical jury issue. Plaintiffs also seek money recovery through a claim for an accounting. Finally, they seek removal of the general partner, or alternatively a dissolution of the partnership.

Plaintiffs' Claim for Damages is a Classical Jury Issue

Plaintiffs claim that they are entitled to recover "pursuant to section 1732 of Chapter 6 of the Delaware Code, an amount of damages to be proved at trial" as compensation (Complaint, paragraph 29). Your Honor may not have been aware of plaintiffs' demand for damages at the April 21, 1989 conference. It should be noted at the outset that where claims for damages and claims for coercive relief arising out of the same circumstances are joined, the damage issue is tried before a jury and is heard first. See *infra*.

Plaintiffs' Claim for an Accounting is Really One for Damages

Plaintiffs have also pleaded for an accounting, which relief has two aspects. The first is to obtain access to the financial books and records of the partnership. This plaintiffs have already had in discovery. The second aspect is to recover money. Essentially, the accounting remedy is for the recovery of money

damages. In *not joining BMI,* which allegedly received the payments complained of, as a *defendant,* plaintiffs have shown that they are interested in and emphasizing *damages* for their losses, as opposed to *restitution* of unjust benefits. Plaintiffs specifically allege losses in paragraphs 19, 20, and 21 of the Complaint, in which plaintiffs allege *wrongful* payments by BCR *to BMI* of $250,000.00 and $175,000.00.

Furthermore, all of plaintiffs' elements of claims are at law. Plaintiffs have specifically pleaded their right of access to BCR's books and records as a "statutory obligation" (Complaint, paragraph 16). Similarly, plaintiffs in their second claim demanded an accounting and cited to a statute, 6 Del. C. Sec. 1710(a)(2).

Plaintiffs expounded at length a presumably statutory duty on the part of defendants to have the questionable payments approved by a quorum of the disinterested directors or shareholders of the general partner or by the limited partners (paragraphs 19, 20). The same applies to plaintiffs' allegations that bids were not solicited for the services for which said sums were paid (paragraph 20). Plaintiffs also claimed that there was no need to make said payments. This raises in turn the doctrine of reasonable business purpose, which is a legal issue. Plaintiffs claim that the payments were excessive, compared to the "reasonable value" of the services actually rendered, (paragraph 20), and thus wasteful. "Reasonableness" and "value" are, of course, traditionally jury questions.

An Accounting, Like All Money Recovery, Requires Jury Trial

The leading authorities on the "legal" versus "equitable" relief question are *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 70 SCT 948. 3 LED2d 988 (1959); *Dairy Queen, Inc. v. Wood,* 369 US 469, 82 SCT 894, 8 LED2d 44 (1962); and *Ross v. Bernhard,* 396 US 531, 90 SCT 733, 24 LED2d 729 (1970).

In *Dairy Queen*, plaintiffs sought an *accounting*. The Court reasoned that by requesting an accounting, the plaintiffs were essentially seeking money damages. Therefore, "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal." *Id.*, 82 SCT at 899.

The right to a jury trial was not defeated by the plaintiffs' use of the term "accounting" rather than "damages" in their prayer for relief. Rather, "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Id.* at 900.

What determines whether claims are equitable or legal is the substance of the relief sought and not their characterization by the parties, *Dairy Queen, supra; Bernstein v. Universal Pictures, Inc.*, 79 FRD 59 (SDNY 1978) (right to jury trial not dependant on choice of words used in the pleadings), or the statute creating the cause of action, *In re Gartenberg*, 636 F2d 16, 18 (2d Cir 1980). It is sufficient that the claims can be analogized to traditional legal actions. *Securities and Exchange Commission v Petrofunds, Inc.* 420 FSupp 958 (SDNY 1976).

In *Dairy Queen* the plaintiff sought an injunction and an accounting for profits. Both the accounting and injunction were equitable remedies in a historical sense (there had also been a legal action of "account".) However, the accounting for profits does not necessarily involve any *in personam* orders by the courts. It differs from a judgment at law in that it requires the defendant to pay any profits he had made from his misconduct, whereas the judgment at law would ordinarily require the defendant to pay any losses the plaintiff may have suffered – not necessarily the same thing (note, plaintiffs herein do not seek restitution of BMI's gains, but rather their own losses, *supra*). In *Dairy Queen* Justice Black pointed out that the complexity of measuring the defendants' profits on the facts is normally not too great a task for a jury, and even that where it is, a master may be appointed to help. The different measure of recovery is not peculiarly equitable, nor is it a recovery that can be enforced only by equitable remedies. (Recovery of gains

of a wrongdoer is also permitted at law, in *quasi contract.*) In short, the Court thought that there is nothing but historical attitude that makes this kind of case an equitable one. Thus, a jury trial was required.

Plaintiffs' Derivative Suit Too is at Law

The Supreme Court has reaffirmed the principles of *Beacon* and *Dairy Queen* on several occasions, and there does not seem to be much doubt that the Court is committed to this approach. See D. Dobbs, *Remedies,* 1973, pages 68-81. Subsequent decisions have held that even in such matters as derivative suits, the jury trial rules of *Beacon* and *Dairy Queen* will apply. *Ross v Bernhard, supra.* The derivative suit is brought to enforce a right held by a corporation or partnership but one it will not enforce for itself, usually because the claim is against directors or other insiders. The *right* may be purely legal, for example, a simple money claim. However, common law did *not* afford any *standing* to stockholders or limited partners. *Equity intervened* to permit them to enforce the *legal right* on behalf of the corporation or limited partnership. In line with *Beacon-Dairy Queen,* this "substantive" equity is now treated as having "worked over" into law and a jury trial is granted.

Thus, in the instant case, plaintiffs' derivative claim on behalf of the partnership (i.e. paragraph 29 of Complaint) is legal, too, and is to be determined by the jury.

When Coercive Orders and Money Recovery are Combined

The decisions in *Beacon Theatres* and *Dairy Queen* treat as equitable only those questions involving an *in personam* order (injunction). All money remedies are treated as legal. If both legal relief (accounting) and equitable relief (injunction) are involved, the jury decides the facts involved in the legal matter, and the judge then may add such equitable relief as may be consistent with the jury's determination.

If the party establishes that the legal remedy is inadequate because it needs an *in personam* order such as an injunction, then it has a legitimate claim to a purely equitable remedy and no jury trial is required to award this. However, if there are any legal issues in the case, these must be tried first. The result is that the judge can grant final equitable remedies only to the extent that these may be consistent with the jury's decision on the facts of the legal issues. This will not prevent a preliminary Honorable injunction as may be needed, which may be issued by the judge even before the legal issues are tried, but which will last only until the jury's findings are in, at which time equitable relief must be mad consistent with those findings. *Dairy Queen, supra,* 369 US 469, 82 SCT, 894.

The jury's resolution of the legal claims in the complaint and the counterclaims had a collateral estoppel effect on the same factual issues raised in the subsequent bench trial. *Wade v Orange County Sheriff's Office,* 844 F2d 951 (2d Cir 1988) (the court is precluded from deciding factual issues differently than how they were decided previously by a jury); *Rosen v. Dick,* 639 F2d 82 (2d Cir 1981).

The principles enunciated in *Dairy Queen* and *Beacon Theatres* have been specifically applied by the U.S. Court of Appeals for the Second Circuit, as well as by the U.S. District Court for the Southern District of New York. *E.g., Lee Pharmaceuticals v Mishler,* 526 F2d 1115, 1116 (2d Cir 1975) (where issue is entitlement to a jury trial, "the Supreme Court's opinion in *Diary Queen* [citations omitted] is the lodestar which must guide our analysis.") *See also Heyman v Kline,* 456 F2d 123 (2d Cir 1972).

In *Windsurfing International, Inc.,* 534 FSupp 581 (SDNY 1982), plaintiff sought both injunctive relief and money damages for an infringement of its patent. The Court held that the defendants' request for a jury trial could not be denied.

In the instant case, the plaintiffs' complaint is in great part for legal relief. *Third Claim for Relief,* plaintiffs' Complaint, page

8. In paragraph 29, plaintiffs request money damages as compensation. Plaintiffs also request an accounting and dissolution of partnership. Note that an accounting, while historically equitable is now held to be a legal remedy since it seeks money recovery. In regard to the prayer for an order for dissolution, "[s]ince the complaint requests a money judgment, it presents a legal claim for which [defendant] would be entitled to a jury trial, despite the fact that the complaint also seeks injunctive [equitable] relief." *Windsurfing,* 534 FSupp at 585.

Plaintiffs are not Entitled to a Coercive Remedy and to a Bench Trial Even on Part of Their Claims as a Matter of Law.

In the instant case plaintiffs did not plead a threat of irreparable harm nor that remedy at law is inadequate. yet such a showing is essential for obtaining a coercive remedy:

> The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones since this has the same effect as an equitable injunction of the legal claims . . . . Inadequacy of remedy and irreparable harm are practical terms . . . . As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules. *Beacon Theatres v Westover* 359 US at 506-07, 79 SCT at 954-55.

The *only* wrongs plaintiffs pleaded are the payments by the partnership to Brignoli Models, Inc, totalling $425,000.00, plus the use of a $175,000.00 BCR certificate of deposit as collateral for a BMI loan, for which they have not even pleaded any resulting damages. (Complaint, paragraph 17.) They claim that these

acts were unreasonable and wasteful, and that value was not rendered. If plaintiffs succeed in proving any of their factual contentions, their money recovery is adequate and appropriate. In fact, plaintiffs seek damages and ignore restitution even though they characterize their claim as a demand for an accounting. (Complaint, paragraph 29) (supra). Plaintiffs' prayer for dissolution of the partnership or removal of the general partner is not supported by their pleadings.

Thus, as a matter of law, plaintiffs are not entitled to a coercive order and therefore are not entitled to a bench trial even on part of their claims.

II. DEFENDANTS' COUNTERCLAIMS

Legal Counterclaims to Equitable Claims are Determined by the Jury

Even assuming *arguendo* that plaintiffs' claims are all equitable and not to be tried before a jury (although the opposite is true), still defendants' counterclaims ought to be determined by a jury.

In the *Beacon Theatres* case, plaintiff, fearing an anti-trust suit by defendant brought the action to have the matter settled. Plaintiff sought (1) in injunction restraining defendant from suing under the anti-trust laws and (2) a declaratory judgment that plaintiffs' operations were legal. Defendant filed a counterclaim, alleging that plaintiff violated the anti-trust laws, seeking treble damages. This counterclaim was the very claim plaintiff had sued to enjoin, and it raised the same issues as plaintiff's claims – that is, the validity of plaintiffs' business arrangements under the anti-trust laws. In the plaintiffs' complaint, these issues arose in an equitable context in the sense that the plaintiff had sought the equitable remedy of injunction. In the defendants' counterclaim, those same issues arose in a "law" context, because the defendant's counterclaim merely sought damages. In the older, pre-merger practice, a jury trial

might or might not have been granted on these facts; it would have depended on the judge's discretion. The Supreme Court held that, pre-merger procedures notwithstanding, legal counterclaims to equitable claims ought to be determined by the jury. *Id.* 79 SCT at 506. *See Heyman, supra,* at 129 (legal claim in defendants' counterclaim entitled him to jury trial on the issues of breach of contract); *see also Lee Pharmaceuticals v Mishler, supra,* (right to a jury trial where counterclaim was for money recovery in defendants' counterclaim is irrelevant to the issue).

Defendants Counterclaims Are At Law

Defendants and counterclaimants make the following allegations in their Answer and Counterclaims. Paragraphs 86 and 87 state a claim for *damages* for breach of fiduciary duty by all plaintiffs. Paragraph 88 and 89 state a claim for *damages,* for tortious interference with contract by all plaintiffs. Paragraph 92 states a claim for *damages* for breach of employment contract by plaintiff Curley. Paragraphs 94, 95 and 96 state a claim for *damages* for defamation and unfair competition by plaintiffs Curley and Roberts. And paragraph 98 state a claim for *damages* for negligence by all plaintiffs. Our proposed pre-trial order (Part VI) specifically mentions an accounting for profits.

All the above remedies look to money recovery. In addition, breach of contract, tortious interference with contract, defamation, unfair competition, and negligence are historically legal claims. They all require a trial by jury.

Please note that our proposed Pre-trial Order specifically mentions the equitable relief of an order by the Court to plaintiffs to redeem their limited partnership interest in BCR in consideration for the liquidating value of their interest. This is the only equitable relief to be determined by the Court (see Proposed Pre-trial Order, at VI).

CONCLUSION:

The Court should grant defendants' jury trial demand on both the claims and counterclaims where the parties are seeking money recovery. Defendants' request must be granted even though plaintiffs also pray for accounting and dissolution of partnership. The demands for coercive remedies of both sides must be tried *after* all money claims have been determined by a jury. Finally, the jury's findings as to any factual issues common to both the money and coercive remedies have a collateral estoppel effect with regard to the subsequent bench trial to determine whether coercive relief ought to be granted.

Respectfully submitted,
/s/ Arie E. David

AED:jc
cc: Glen Banks, Esq.
John F. Triggs, Esq.

FED. R. CIV. P. 17. Parties Plaintiff and Defendants; Capacity

(a) Real Party In Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has

no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Titled 28, U.S.C. §§ 754 and 959(a).

(c) **Infants or Incompetent Person.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

FED. R. CIV. P. 19.Joinder of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impedc the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joiner of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those

already parties; second, the extend to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

FED. R. CIV. P. 21.Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be served and proceeded with separately.

FED. R. CIV. P. 23.2 Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interest of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).